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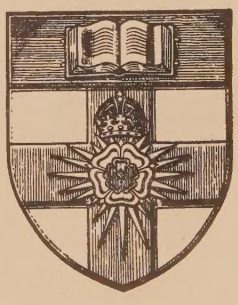

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AND ON APPEAL THEREFROM IN THE

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DECISIONS ON

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OF

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1898.

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| 68 | 8 from bottom | 10*l.* householder | inhabitant occupier of a dwelling-house. |
| 559 | 2 from bottom | *Graham & Graham* | *Carthew & Wheeler for Graham & Graham.* |
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| 774 | 1 from top | assignment | assignee. |
| 878 | 12 from bottom | is good law | is not good law. |

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# CASES

DETERMINED BY THE

# QUEEN'S BENCH DIVISION

OF THE

# HIGH COURT OF JUSTICE

AND BY THE

# COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

# COURT FOR CROWN CASES RESERVED

AND BY THE

# RAILWAY AND CANAL COMMISSION.

1897. 1898.

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## DAVIS *v.* REILLY.

1897
*Oct.* 27.

*Bill of Exchange—Action on Consideration—Bill coming into Hands of Plaintiff after Action brought.*

Where a buyer of goods has given a bill of exchange for the price, an action will not lie for the price, even after dishonour of the bill, if at the date of the commencement of the action the bill is outstanding in the hands of a third party. It is not enough to entitle the plaintiff to succeed that he is in possession of the bill at the date of the trial.

APPEAL from the Westminster County Court.

William Burnley, the original plaintiff in the action, having supplied goods to the defendant to the amount of 25*l.* 11*s.* 7*d.*, on October 4, 1896, drew a bill on the defendant for 20*l.* at three months, which the defendant accepted. Burnley indorsed the bill to one Bullock. At maturity the bill was dishonoured,

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DAVIS v. REILLY.

and Bullock thereupon sued Burnley as drawer. On January 21, 1897, Burnley commenced the present action against the defendant for the price of the goods supplied. On February 3 Burnley, who had in the meantime filed his petition in bankruptcy, was adjudicated a bankrupt; and on February 22 F. W. Davis was appointed trustee, and was substituted for Burnley as plaintiff in the present action.

In the bankruptcy of Burnley, Bullock as holder of the bill was called upon to value his security. He considered it of no value, and surrendered it to Davis, the trustee, before the hearing of the action of *Davis* v. *Reilly*. At the hearing the county court judge gave judgment for the plaintiff on the terms that the bill should be handed back to the defendant upon the judgment being satisfied.

The defendant appealed.

*Abinger*, for the defendant. At the date when the action was begun the bill was outstanding in the hands of the indorsee, and consequently at that date the bill, although dishonoured, continued to operate as a suspension of the cause of action for the price of the goods. The fact that the plaintiff has since become the holder of the bill is immaterial. In Bullen and Leake, 3rd ed. p. 542, the form of replication to a plea that the defendant indorsed to the plaintiff a bill on account of the debt, that the bill is overdue and dishonoured, after alleging dishonour and notice to the defendant, goes on to allege that "the plaintiff at the commencement of this action held and still holds the said bill unpaid and unsatisfied." The plaintiff at the time that he takes out his writ must be in a position to hand over the bill to the defendant; otherwise the defendant might have to pay twice over. In *Price* v. *Price* (1), where, in an action for money lent, a plea that before action the plaintiff took the defendant's note on account of the debt was held bad for not averring that either the note was still running or had been indorsed over by the plaintiff, Parke B. said (2): "To make this plea, therefore, good, it should be averred that the note was not in the plaintiff's hands, that is, that it was

(1) (1847) 16 M. & W. 232. (2) 16 M. & W. at p. 242.

indorsed over before action brought." And that decision was approved in *National Savings Bank Association* v. *Tranah.* (1)

*Grinwood Mears*, for the plaintiff.

WRIGHT J. The defendant's counsel candidly admitted that there were no merits in this case, and that the only question was one of costs. But he contended that in point of law he is entitled to judgment, and, as far as I can see, his contention is sound. It is quite true that the defect in the plaintiff's claim can be immediately cured by bringing another action; but that cannot affect our decision here. I was at first inclined to think that on equitable grounds it would be sufficient if the plaintiff could shew that the bill was in his hands at the date of the trial. But on reflection I am satisfied that that is not so. It seems to be clearly settled at common law that an action will not lie for the price of goods, for which a bill of exchange has been given, while the bill is outstanding in the hands of a third party. At the date of the commencement of this action he was not entitled to sue, and we have no power to amend so as to give him a new cause of action which he had not got when the action was begun. As to 20*l.*, parcel of the amount claimed, the appeal must be allowed.

KENNEDY J. I am of the same opinion.

Solicitor for plaintiff: *J. Tickle.*
Solicitor for defendant: *O. C. Kent.*

(1) (1867) 36 L. J. (C.P.) 260.

J. F. C.

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*Oct.* 27.

## PHILLIPS *v.* THE SCHOOL BOARD FOR LONDON. COCKERTON *v.* THE SAME.

*Education Acts—Teachers' Remuneration—Superannuation Fund—Management of by School Board—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 35.

By s. 35 of the Elementary Education Act, 1870, a school board "may assign" to their officers and teachers "such salaries or remuneration (if any) as they think fit":—

*Held*, that it is within the powers of a school board under the above section to establish and manage a superannuation fund for the payment of allowances to their officers and teachers upon their superannuation, such fund being provided by contributions from the officers and teachers out of their salaries.

APPEALS from the Westminster County Court.

The plaintiff in the first action, Miss Eliza Phillips, entered the service of the defendants in 1884 as a teacher in a board school, and continued in that capacity down to April 4, 1897, when she resigned her post.

In January, 1888, the defendants passed a resolution establishing a scheme of superannuation allowances for all servants of the board, including the teachers, and resolving that, in consideration of such allowances being granted, a deduction of 2 per cent. should be made from the servants' salaries; but providing, as regards the teachers, that in the event of certain parliamentary powers sought in connectiom with the said scheme not being obtained within five years the amounts deducted should be repaid. The scheme came into operation on March 25, 1888, and from that date down to March, 1893, 2 per cent. was, in accordance with the resolution, deducted from all the servants' salaries, including that of Miss Phillips.

In March, 1893, the defendants, having failed to obtain the parliamentary powers sought, passed a resolution that every officer appointed after that date should be appointed subject to a deduction of 2 per cent. from his or her salary, such amount to be carried to a superannuation fund; that every teacher then in the service of the board should be given the option of

joining the superannuation fund subject to the condition of such deduction, and that any such teacher who was not desirous of joining the fund should be repaid the amounts of his or her contributions to the fund with interest. Miss Phillips, having received notice of the resolution, elected to join the fund on the terms above mentioned; and from that date down to the date of her resignation in April, 1897, a deduction of 2 per cent. continued to be made from her salary. In January, 1897, having given notice of her intended resignation, she claimed from the defendants a return of the deductions from her salary made from March, 1888, when the scheme first came into operation, down to date. That demand being refused, she brought this action to recover the sum of 32*l.* 6*s.* 8*d.*, being the aggregate of such deductions.

Mrs. Cockerton, the plaintiff in the second action, was appointed as an assistant teacher at one of the defendants' board schools on July 29, 1894, and had notice that she was appointed upon the terms specified in the above-mentioned resolution of March, 1893.

On February 10, 1897, she left the service of the defendants, and brought this action to recover a sum of 3*l.* 13*s.* 9*d.*, the amount of the deductions from her salary.

The county court judge held in each case that the plaintiff was not entitled to recover.

The plaintiffs appealed.

*Jelf*, *Q.C.*, and *Organ*, for the appellants. The superannuation schemes were wholly ultra vires. The board had no power to enter upon any such scheme at all. They are a statutory corporation, and their powers are strictly confined within the four corners of the statute: Brice on Ultra Vires, 3rd ed. p. 38; *Colman* v. *Eastern Counties Ry. Co.* (1) And the Elementary Education Act, 1870, makes no provision for the board's pensioning their servants. In any case the board have no power to charge the expenses of managing the fund upon the rates; and that of itself is sufficient to vitiate the whole scheme. But if the scheme was ultra vires the plaintiffs

(1) (1846) 10 Beav. 1.

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PHILLIPS v. LONDON SCHOOL BOARD.

COCKERTON v. THE SAME.

are entitled to recover back the deductions made from their salaries, none the less because they assented to their being so made. Their agreement with the board was illegal and void; and to the extent to which the board benefited by that agreement the plaintiffs may recover their money back. In *Re Phœnix Life Assurance Co.* (1), where a joint stock company, incorporated for the purpose of carrying on the business of life assurance only, improperly extended its business to marine insurance, it was held that, though the marine policies granted by them were void, the holders of such policies were entitled to claim a return of the premiums paid by them.

*Ram*, for the respondents, was not called upon.

WRIGHT J. We do not feel any doubt about these cases. By s. 35 of the Elementary Education Act, 1870, the London School Board may appoint officers and teachers "to hold office during the pleasure of the board, and may assign them such salaries or remuneration (if any) as they think fit." In 1888 the school board established a scheme for a superannuation fund which was to be provided entirely from contributions by the teachers and other officers out of their salaries. The expenses of the management of that fund were, it appears, in fact paid out of the rates, but there was no provision in the scheme that they should be so paid, nor until these actions were brought does it appear to have been known to the plaintiffs that they were in fact so paid. The plaintiff Miss Phillips became a teacher in 1884, and from 1888 down to 1893 the usual deductions according to the scheme were made from her salary as it was paid. In 1893 the board found that there were difficulties in the way of carrying on the fund, and they offered to the existing staff, including Miss Phillips, the option of being paid off their former contributions with interest, or of coming in under an amended scheme. She elected to come into the superannuation scheme on the new basis. And so things went on till April last, when she sent in her resignation. She then sought to recover back the amount of her contributions to the fund. I think she cannot recover. The money

(1) (1862) 2 J. & H. 441.

was carried to the fund in pursuance of a contract between her and the board, and, unless it can be shewn that that contract was void as being ultra vires, she must be bound by it. The only suggestion for its being held to be ultra vires was that the expenses of management had been thrown upon the rates. But even assuming that so to charge the expenses upon the rates is illegal, it was no part of her contract that they should be so charged, and the illegality, if any, cannot affect the validity of her contract. As to the superannuation fund itself, I cannot see anything objectionable in the scheme. I think it was perfectly competent for the board under s. 35 to assign their teachers a remuneration, partly to be paid annually or quarterly, and partly to be accumulated until the expiration of the period of service or of some other period, and then applied for the benefit of those who agreed to join the scheme. Further, I am not at all sure that it would be wrong for the board to pay the expenses of administering the fund out of the rates. But this latter is a point which we need not here decide.

With regard to the other plaintiff, Mrs. Cockerton, I see no substantial difference in her case. She was not appointed a teacher under the board until after the new superannuation scheme had been adopted; but she agreed to accept her appointment on the terms of this deduction being made. The appeal must be dismissed.

KENNEDY J. I agree. There is no proof whatever that there was anything ultra vires so far as the contract between the parties was concerned; and under those circumstances the plaintiffs cannot demand to have money repaid which was with their full assent paid away for a special purpose.

*Appeal dismissed.*

Solicitors for plaintiffs: *Baker & Nairne.*
Solicitor for defendants: *C. E. Mortimer.*

J. F. C.

1897
*Oct.* 29.

## MORLEY *v.* CARTER.

*Landlord and Tenant—Compensation for Improvements—Notice of Claim—Determination of Tenancy—Agricultural Holdings Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 7.

A tenant of a farm on a yearly tenancy was by the terms of his lease to hold the land from February 2 and the buildings from May 1. In June, 1896, he gave notice to the landlord of his intention to deliver up the land on February 2, 1897, on which latter date he duly delivered up possession of the land. On February 26, 1897, he gave notice to the landlord under the Agricultural Holdings Act, 1883, claiming compensation for unexhausted improvements; and on May 1, 1897, he gave up possession of the buildings.

By s. 7 of the said Act notice of claim for compensation must be given two months at least before the determination of the tenancy:—

*Held*, that the tenancy determined within the meaning of the Act on February 2 and not on May 1, and that the notice of claim was consequently too late.

APPEAL from the county court of Yorkshire holden at Halifax. In 1890 James Carter let to Arthur Morley a farm, situate at Ovenden, near Halifax, in the county of Yorkshire, on a yearly tenancy. By the terms of the lease, which were in accordance with the custom of the district, the tenant was to hold the land from February 2 and the farmhouse and buildings from May 1. On June 19, 1896, the tenant sent the following notice to his landlord: "I hereby give you notice that it is my intention on the 2nd day of February, 1897, to quit and deliver up the land belonging to you situate at Ovenden which I now hold of you. Arthur Morley." In accordance with that notice the tenant gave up possession of all the land on February 2, 1897, and the landlord gave possession of it to a new tenant. On February 26, 1897, Morley sent the landlord a notice in writing of a claim for compensation under the Agricultural Holdings Act, 1883, in respect of the unexhausted value of certain improvements executed by him upon the said holding. The landlord repudiated the claim; whereupon Morley, on April 29, sent to the landlord a notice that he had appointed a Mr. Ackroyd to act as referee on his behalf to assess the compensation, and requiring

the landlord to appoint a referee in the same matter. On May 1 Morley gave up possession of the house and buildings. The landlord having failed to appoint a referee, Morley, on June 1, issued a summons under s. 9, sub-s. 6, for the appointment of a referee by the county court at Halifax. The registrar of the county court held that Morley's notice of claim for compensation was not given within the time prescribed by s. 7 (1) of the Agricultural Holdings Act, and that he was consequently not entitled to the appointment asked. He accordingly dismissed the application. Morley appealed to the Divisional Court. (2)

*Beverley*, for the appellant. If the tenancy did not determine until May 1, the date when the buildings were to be given up, the notice of claim sent on February 26 was in time, for it was more than two months before the determination of the tenancy as required by s. 7. The words "determination of the tenancy" are defined by s. 61 to mean the "cesser of a contract of tenancy," and a "contract of tenancy" means "a letting of or the agreement for the letting land." Here the land and

(1) By the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), s. 1, "Subject as in this Act mentioned, where a tenant has made on his holding any improvement comprised in the first schedule hereto, he shall . . . . be entitled on quitting his holding at the determination of a tenancy to obtain from the landlord as compensation under this Act for such improvement such sum as fairly represents the value of the improvement to an incoming tenant."

Sect. 7: "A tenant claiming compensation under this Act shall, two months at least before the determination of the tenancy, give notice in writing to the landlord of his intention to make such claim."

"Where a tenant gives such notice, the landlord may before the determination of the tenancy, or within fourteen days thereafter, give a counter-notice in writing to the tenant of his intention to make a claim in respect of any waste or any breach of covenant or other agreement."

Sect. 54: "Nothing in this Act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden."

Sect. 61: "In this Act—

"'Contract of tenancy' means a letting of or an agreement for the letting land for a term of years, or for lives, or for lives and years, or from year to year;

"'Determination of tenancy' means the cesser of a contract of tenancy by reason of effluxion of time, or from any other cause;

"'Holding' means any parcel of land held by a tenant."

(2) Counsel for the respondent declined to take any objection that the appellant's remedy was not by appeal.

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buildings were let under one contract, and the cesser of that contract was on May 1. The case of *In re Paul* (1) is an authority in the tenant's favour as shewing that where by the terms of the tenancy different portions of the holding are to be given up at different dates the tenancy is to be held to determine on the date when the last portion is to be given up. No doubt by s. 54 the Act is not to apply to a holding that is not either agricultural or pastoral. But the farm buildings and fold yard come within that category, and consequently must be regarded as a "holding" within that section.

*Clavell Salter*, for the respondent. The registrar was right. When by custom or lease different parts of a farm are to be given up at different times the tenancy must be held to determine at the date when the last agricultural or pastoral portion is to be given up. The Agricultural Holdings (Scotland) Act, 1883 (46 & 47 Vict. c. 62), differs from the English Act only in requiring a four months' notice instead of two; in other respects the language is the same. In *Black* v. *Clay* (2), a case which arose under that Act, the respondent, the tenant of a farm, held on the terms that he was to remove from the grass and fallow land at Whit Sunday, 1892, from the arable land at Martinmas, 1892, and from the barns, barnyard and cot-houses at the following Whitsuntide. Lord Watson was of opinion that the tenancy determined at Martinmas, 1892. "I entertain serious doubts," he said, "whether after his removal in the autumn of 1892 the respondent remained in possession of any holding within the meaning of the Act. I do not think that the bare possession of a barn, barnyard and two cot-houses, unconnected with any land either pastoral or agricultural, is possession of a holding recognised by the Act." If the appellant in this case is right, and the tenant may delay making his claim till after the land has been let to a new tenant, it may happen that the landlord has let in the new tenant without any valuation of unexhausted improvements on the assumption that no claim is going to be made by the outgoing tenant. That would be a great hardship. And, indeed, it is what in fact occurred in the present case. *In re Paul* (1) is not against the respondent's contention.

(1) (1889) 24 Q. B. D. 247. (2) [1894] A. C. 368.

In that case the tenant held 1200 acres, of which he, in accordance with the custom of the country, gave up 1000 acres in October, 1888, and the remaining 200 acres in February, 1889; and it was held that a notice of claim given in November, 1888, was in time. But there the notice was given more than two months before the last pastoral portion of the farm was parted with.

*Beverley*, in reply. Lord Watson's opinion in *Black* v. *Clay* (1) was only an obiter dictum. Lord Herschell expressly declined to decide the point as unnecessary to the decision. The objection on the ground of hardship to the landlord, in the event of his letting the new tenant in without a valuation of the improvements, would equally apply to such a case as *In re Paul* (2), for there the claim would presumably be mainly in respect of improvements to the 1000 acres of arable and other land surrendered before the date of the notice of claim.

WRIGHT J. I think that with the assistance of the opinion expressed in *Black* v. *Clay* (1) we can have little doubt as to how this case ought to be decided. Sect. 1 gives a tenant a general right to compensation "on quitting his holding at the determination of a tenancy." Then by s. 54 the Act is not to apply "to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural, and as to the residue pastoral"; and by s. 61, "'holding' means any parcel of land held by a tenant." Therefore the Act contemplates compensation being given only on the determination of the tenancy of a holding that is either agricultural or pastoral, or partly one and partly the other. Here, after February 2, there was no tenancy by the appellant of any holding of such a description. It was, therefore, too late for him then to claim compensation under the Act. The case of *In re Paul* (2) has no application, for there, though the tenant surrendered the larger portion of his farm before giving notice of claim, he continued for more than two months after giving such notice in occupation of 200 acres of meadow land, and it was because of that fact that the Court

(1) [1894] A. C. 368. (2) 24 Q. B. D. 247.

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held that the tenancy ought to be regarded as continuing, and that the notice was consequently in time.

KENNEDY J. I am of the same opinion. The case of *In re Paul* (1) was decided upon the ground that there was a retention of 200 acres of pastoral land in respect of which the tenant might make a claim and the landlord a counter-claim. It was open in that case to say that the tenancy had not determined until those 200 acres were given up. I think that here there were separate tenancies of the agricultural holding and of the buildings.

*Appeal dismissed.*

Solicitors for appellant: *Turner & Co., for Naylor, Keighley.*
Solicitors for respondent: *Bower, Cotton & Bower, for Longbottom & Sons, Halifax.*

J. F. C.

C. A.
1897
*Oct.* 25.

[IN THE COURT OF APPEAL.]

## JAY AND ANOTHER *v.* BUDD.

*Practice—Writ of Summons—Substituted Service—Defendant out of Jurisdiction—Order IX., r. 2.*

Where a writ for service within the jurisdiction was issued against a defendant who was then within the jurisdiction, but, after the writ had come to his knowledge, went out of the jurisdiction, though not for the purpose of evading service:—

*Held*, by the Court of Appeal (Lord Halsbury L.C. and Collins L.J., Rigby L.J. dissenting), that an order for substituted service of the writ might be made under Order IX., r. 2, the circumstances of the case shewing that it would be just to make such an order.

*Fry* v. *Moore*, (1889) 23 Q. B. D. 395, and *Wilding* v. *Bean*, [1891] 1 Q. B. 100, distinguished.

APPEAL against the refusal of a judge at chambers to make an order for substituted service of the writ in an action.

The writ was in the ordinary form for service within the jurisdiction, the claim stated in the indorsement being for money lent by the plaintiffs, who were partners, to the defendant

(1) 24 Q. B. D. 247.

and money paid by the plaintiffs for the defendant at his request. The affidavit of the plaintiff, Jay, stated as follows. The defendant on the afternoon of October 5, 1897, called at the office of the plaintiffs' firm in reply to a letter written to him demanding payment of the amount claimed. At this interview the plaintiff informed the defendant that he had heard that the defendant was leaving England, and that his firm would require payment of their account. The defendant then offered to discharge the account by giving a cheque post-dated six months thence, but the plaintiff refused this and stated that his firm would in all probability accept the defendant's bills at three months and six months; whereupon the defendant left the office without making any arrangement for payment, saying that the plaintiff could communicate with Mr. Allingham. The plaintiff immediately communicated with his firm's solicitors, who stated that it was too late in the day to issue a writ, but that they would do so the first thing on the next morning. The plaintiff informed his solicitors that the defendant was leaving next day from Southampton for Jamaica. The plaintiff stated in his affidavit that he did not know any address in Jamaica where the defendant could be communicated with, and had no idea when he would return, as the defendant declined to inform him when asked that question. The plaintiff further stated that he knew Mr. Allingham to have acted as solicitor for the defendant in various matters. An affidavit made by a clerk in the service of the plaintiffs' solicitors stated that on October 6, 1897, he served the defendant with a true copy of the writ on board the steamship *Don* at Southampton Dock. It was stated by counsel in Court that this clerk was instructed at Southampton by telegram from the plaintiffs' solicitors that the writ had been issued and to effect service. The clerk further stated in his affidavit as follows. At the time of serving the copy writ there was present Mr. Allingham, who stated that he was the defendant's solicitor. He asked the clerk to produce the original writ. The clerk explained to him that he was unable to do this, as the writ was only issued in London that morning. Mr. Allingham thereupon stated that the service was not complete without it. The

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clerk nevertheless left a copy of the writ with the defendant, who handed it to Mr. Allingham. The clerk asked Mr. Allingham in the hearing of the defendant whether he would accept service for the defendant, but he stated that he would not. The defendant left by the steamship *Don* for Jamaica. The clerk further stated in his affidavit that at the time when he handed the defendant a copy of the writ he also handed him a copy of the writ in another action, in which the plaintiffs' solicitors were the plaintiffs and the defendant and Celladema, Limited, were the defendants, in which action Mr. Allingham had entered an appearance. A letter from Mr. Allingham to the plaintiffs' solicitors was made an exhibit to the clerk's affidavit, in which letter Mr. Allingham inquired whether the plaintiffs had obtained any and, if so, what order upon their application for substituted service. An affidavit made by another clerk in the employ of the plaintiffs' solicitors stated that he had received a letter from Mr. Allingham stating that before the defendant left England he delegated all matters of business to his manager, Mr. Corbett, who was to be found at the offices of the Celladema Company, which was promoted by the defendant. The plaintiffs applied to the judge at chambers for an order for substituted service of the writ, but he refused to make any order.

*Macaskie*, for the plaintiffs, moved ex parte by way of appeal from the judge's decision. The case comes exactly within the words of Order IX., r. 2. There is therefore jurisdiction to make an order for substituted service, and it is submitted that under the circumstances of the case it is clearly just that such an order should be made. The rule gives power to make an order for substituted service wherever the plaintiff from any cause is unable to effect prompt personal service, provided it is just that such an order should be made. There are no words confining the operation of the rule to cases where the defendant is within the jurisdiction. If it had been intended to confine the benefit of Order IX., r. 2, to cases where the defendant is within the jurisdiction, the rule would have contained express provision to that effect. In this case the defendant was within the juris-

diction when the writ issued, and left the country with knowledge of the writ, declining to give authority to any one to appear for him. The case therefore is not like cases such as *Fry* v. *Moore* (1) and *Wilding* v. *Bean* (2), where the writ was one for service within the jurisdiction and defendant was out of the jurisdiction at the time of its issue. [He cited *Wright* v. *Mills* (3); *Adler* v. *Benjamin* (4); *De Bernales* v. *Bennett* (5); *Armitage* v. *Fitzwilliam.* (6)]

LORD HALSBURY L.C. I regret that the Court is not unanimous in this case with regard to the effect of the rules. But for the fact that Rigby L.J. differs from me, I should have said very little in giving judgment, but, as there is a difference of opinion, I think it right to express my view more fully than I otherwise should have done. The object of the provisions with regard to substituted service of process in an action was to avoid the expense and inconvenience attendant upon the old mode of procedure. The scope of such process obviously is that on the one hand every one should be entitled to bring before the courts any subject-matter in respect of which he wishes to sue, and on the other hand that every one sued should have a full opportunity of defending himself against the claim made against him. The provision made by the rules has carefully guarded both of these rights, and has recognised the general proposition that, whether a defendant does or does not already know of the existence and nature of the litigation, he has a right to formal information thereof by being served with a summons to appear. Under the old practice, as I have said, great delay and expense were occasioned in bringing before the Court a reluctant defendant, who was not desirous of having the question in dispute brought into court. To avoid the evils attendant on that practice the provisions of the rules on the subject have given power to the Court under certain conditions to order substituted service. The rule provides

(1) 23 Q. B. D. 395.

(2) [1891] 1 Q. B. 100. See also *Worcester City and County Banking Co.* v. *Firbank, Pauling & Co.*, [1894] 1 Q. B. 784.

(3) (1886) 82 *Law Times* newspaper, 44.

(4) (1885) 1 Times L. R. 308.

(5) (1894) 10 Times L. R. 419.

(6) W. N. (1875) 238.

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that, "when service is required, the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the Court or a judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or judge may make such order for substituted or other service, or for the substitution for service of notice by advertisement or otherwise, as may seem just." The words of the rule only require that it shall "be made to appear to the Court or a judge that the plaintiff is from any cause unable to effect prompt personal service," and I do not feel at liberty to import into the terms of the rule a qualification to the effect that, if the impossibility of effecting personal service arises by reason of the defendant's leaving the country directly after he hears of the litigation, the rule cannot be applied. The rule furthermore makes it the duty of the Court to inquire into the circumstances of the case and make such order as may seem just. No Court or judge would exercise the jurisdiction given by the rule unless satisfied that it was just that there should be substituted service in the manner proposed, or without taking care that full opportunity was given to the defendant of defending the action. In this case I think every element exists which was contemplated by the rule as affording ground for substituted service. The defendant has practically admitted that he owes the debt and has offered to pay it in a particular way. A copy of the writ was handed to him, and therefore he had notice and must have believed that he was being sued in this country; he left this country, knowing that he would thereby avoid personal service of process, though I do not say that he left the country for the purpose of doing so; and he declined to give authority to any person to appear for him in the action. It appears to me that under these circumstances it is just that substituted service should be ordered. In what manner that service should be effected is a matter of discretion depending on the circumstances of the particular case. I think that the service in this case should be upon the solicitor who declined to accept service, and also upon the gentleman to whom it appears the defendant has left the management of his business during his absence;

and I think the defendant should have a reasonable time, say two months, within which to appear.

RIGBY L.J. I regret that a question which is one of some importance should have to be determined on an ex parte application, and after hearing one side only; for it seems to me highly desirable that we should have an opportunity of being referred to anything that may be contained in any reported case which would throw light on this subject. It is remarkable that no reported case has been brought to our notice in which substituted service has been ordered in a case of this kind where the defendant was out of the jurisdiction; and, so far as I can gather from the observations made by learned judges in certain of the cases to which our attention has been called, it would seem that they would not have thought it right to order substituted service in such a case as this, unless they thought that the defendant had gone out of the jurisdiction to evade service of the writ.

In this case the plaintiff knew that the defendant was going abroad, and asked him at an interview which took place to pay the debt. The defendant not doing so, the plaintiff at some time on the next day issued a writ and, as we are told, instructions were sent by telegraph to Southampton to effect service on the defendant there. A regular service could not have been then effected, because there was no time to send down the original writ. The clerk finds the defendant on board a ship about to sail for Jamaica. When the copy writ is handed to the defendant, he asks to see the original. It is not produced, and, indeed, there does not really appear to be any direct evidence that it was then issued. Under the circumstances of this case, the defendant appears to me to be free from any imputation of having gone abroad to evade service of the writ. The question that arises is as to what is to be done in the case of an application to allow substituted service, where upon the facts of the case it appears that personal service could not at the time of the application be effected on the defendant. I may be wrong, but it appears to me that the authorities, especially the case of *Wilding* v.

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*Bean* (1), shew that there cannot be an order for substituted service where it is plain that at the time of the application for such an order the writ, being one for service within the jurisdiction, cannot be served on the defendant himself because he is out of the jurisdiction. In the present case it is clear that, when the application for substituted service was made, the defendant himself, being out of the jurisdiction, could not be served with the writ. In the case of *Wilding* v. *Bean* (1) I think we have the authority of the Court of Appeal for the proposition that the only case in which there can be substituted service of a writ for service within the jurisdiction upon a defendant who is out of the jurisdiction is where the defendant has gone out of the jurisdiction to evade service, and that except in that case there cannot be substituted service where personal service would be impossible. It appears to me that the decision of the learned judge at chambers was right, though as my view differs from that of the Lord Chancellor and my brother Collins I express it with diffidence.

COLLINS L.J. I think the appeal should be allowed. I do not find anything in the rules which debars us on technical grounds from doing what will meet the justice of the case. The writ in the action appears to have been issued before the defendant left the country. Notice of the fact that it had been issued was given to him, and a service of it was attempted in a manner which might have been valid, and the attempt was only defeated by reason of the fact that the defendant's solicitor being present insisted on the production of the original writ. I think the practice is that, if, at the time of the service of the copy writ, the production of the original is not required, the service is good without it. Such being the circumstances of the case, is there anything in the rules which debars us from giving effect to what the justice of the case requires? I think not. In this case we have nothing to do with any considerations relating to writs for service out of the jurisdiction, for the writ was one for service within the jurisdiction, and, if the plaintiff had been fortunate and the defendant's solicitor had

(1) [1891] 1 Q. B. 100.

not been beside him, it might have been successfully served within the jurisdiction. The words of Order IX., r. 2, provide for substituted service, if it be made to appear to the Court or a judge that the plaintiff is from any cause unable to effect prompt personal service. The facts of the case clearly bring it within those words. Then, is there anything in any other rule that prevents us from giving their full effect to those words? I cannot find anything. It appears to me useless to cite cases as to the service of writs out of the jurisdiction as bearing on this rule. I agree that, if the writ had not been issued until after the defendant had left this country, the only way in which the defendant could have been properly served would have been by proceeding under the practice as to writs for service out of the jurisdiction. In *Wilding* v. *Bean* (1) the decision was that, where the defendant is out of the jurisdiction when the writ issues, the plaintiff cannot have the benefit of the provision for substituted service with regard to a writ which is not for service out of the jurisdiction; he can only get that benefit by proceeding under the rules providing for the issue of writs for service out of the jurisdiction. The fact that in the cases of *Wilding* v. *Bean* (1) and *Fry* v. *Moore* (2) the defendant was out of the jurisdiction when the writ was issued appears to me to distinguish those cases from the present. I do not think that we are entitled to read into the rules words which are not contained in them, and, unless we do so, there is nothing to prevent us from making an order for substituted service in this case. Order IX., r. 2, in effect provides that no order for substituted service shall be made unless it is just to make it. It seems to me clearly just under the circumstances of the present case to make such an order as we are proposing to make.

*Appeal allowed.*

Solicitors for plaintiffs: *Francis & Johnson.*

(1) [1891] 1 Q. B. 100. (2) 23 Q. B. D. 395.

E. L.

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*Oct.* 29.

[IN THE COURT OF APPEAL.]

## *In re* CLARK.
## *Ex parte* CLARK.

*Bankruptcy—Judgment Debtor—Receiving Order in lieu of Committal—Jurisdiction—Foreigner—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-s.* 1 (*d*); *s.* 103, *sub-s.* 5—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.

Where there is jurisdiction to commit a judgment debtor under s. 5 of the Debtors Act, 1869, there is jurisdiction under the Bankruptcy Act, 1883, s. 103, sub-s. 5, to make a receiving order against him in lieu of committing him, even although he is a foreigner not domiciled in England, and has not within a year ordinarily resided, or had a dwelling-house or place of business in England, and consequently a bankruptcy petition could not be presented against him by reason of the provisions of s. 6, sub-s. 1 (*d*), of the Bankruptcy Act, 1883.

APPEAL against a receiving order made by a judge at chambers under the Bankruptcy Act, 1883, s. 103, sub-s. 5. (1)

A judgment having been recovered in this country against the debtor, who was a Chilian subject, he was, while in this country, served with a judgment summons, and an application was made by the judgment creditor to a judge at chambers for an order of committal against him under s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62). It was shewn that he had had means to pay the judgment debt. It was contended on his behalf that upon the evidence it appeared that he was a foreigner not domiciled in England, and that he had not within a year ordinarily resided or had a dwelling-house or place of business in England. (2) The judge, in lieu of committing the debtor, made a receiving order against him.

(1) The sub-section provides: "Where under section five of the Debtors Act, 1869, application is made by a judgment creditor to a court, having bankruptcy jurisdiction, for the committal of a judgment debtor, the Court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor, and on payment by him of the prescribed fee, make a receiving order against the debtor. In such case the judgment debtor shall be deemed to have committed an act of bankruptcy at the time the order is made."

(2) This was disputed by the judgment creditor; but, as will be seen, in the view taken by the Court of Appeal, it became unnecessary to determine the question of fact.

*Muir Mackenzie*, for the debtor.. A receiving order can only be made under s. 103, sub-s. 5, of the Bankruptcy Act, 1883, against a debtor who is subject to the bankruptcy laws. By s. 6, sub-s. 1 (*d*), of the Bankruptcy Act, 1883, a bankruptcy petition cannot be presented against a debtor unless he is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England. Inasmuch as a bankruptcy petition could not be presented against the debtor, there was no jurisdiction to make a receiving order against him. [He cited *Ex parte Blain* (1); *In re Pearson.* (2)]

*H. Reed*, *Q.C.*, and *Hansell*, for the judgment creditor, were not called upon.

A. L. SMITH L.J. I think that the order of the learned judge at chambers was rightly made. It is contended that he had no jurisdiction to make a receiving order, the debtor not being a person who could be made bankrupt upon a petition, because under s. 6, sub-s. 1 (*d*), of the Bankruptcy Act, 1883, a bankruptcy petition cannot be presented against a debtor unless he is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling-house or place of business in England, and the debtor did not come within that category. In my opinion it is unnecessary to consider the question whether the evidence shews that within a year he had ordinarily resided or had a dwelling-house or place of business in England, because upon the true construction of s. 103, sub-s. 5, of the Bankruptcy Act, 1883, wherever a judge has jurisdiction to commit a judgment debtor for not paying the debt under the Debtors Act, 1869, the section in my judgment gives him jurisdiction in mercy to the debtor to make a receiving order against him in lieu of committing him to prison. The debtor being within the jurisdiction was duly summoned to appear before the judge under the Debtors Act, 1869, and the judge was satisfied that he had had means for satisfying the judgment debt, and there was good evidence of this. This being so, the judge had

(1) (1879) 12 Ch. D. 522. (2) [1892] 2 Q. B. 263.

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CLARK, *In re.* CLARK, *Ex parte.*

jurisdiction to commit him under the Debtors Act, 1869, and consequently under the Bankruptcy Act, s. 103, sub-s. 5, he had jurisdiction, with the consent of the judgment creditor, in lieu of committing him to make a receiving order against him. The appeal must be dismissed.

RIGBY L.J. I am of the same opinion. The cases relied on by the counsel for the debtor have really no bearing on the point raised in this case. They were cases where bankruptcy proceedings had been taken against foreigners who were out of the jurisdiction. Here the debtor, being within the jurisdiction, was served with a summons under the Debtors Act, 1869, and might under that Act have been committed to prison for contempt. Under these circumstances the Bankruptcy Act, 1883, s. 103, sub-s. 5, gives the judge jurisdiction, obviously as an alternative in favour of the debtor, with the consent of the judgment creditor, to make a receiving order against the debtor.

COLLINS L.J. I agree. The question under s. 103, sub-s. 5, of the Bankruptcy Act, 1883, appears to me to be, not whether the debtor is within the jurisdiction for the purposes of a bankruptcy petition, but whether he is within the jurisdiction for the purpose of making an order of committal against him. If he was, and there was jurisdiction to make such an order, then it follows that there was jurisdiction to make a receiving order against him under s. 103, sub-s. 5, of the Bankruptcy Act, 1883.

*Appeal dismissed.*

Solicitors for debtor: *Harwood & Stephenson.*
Solicitors for judgment creditor: *Hilberrys.*

E. L.

## BAKER *v.* WILLIAMS.

1897
*Oct.* 29;
*Nov.* 1.

*Local Government — Cowsheds—Contagious Diseases (Animals) Act*, 1878 (41 & 42 *Vict. c.* 74), *s.* 34—*Dairies, Cowsheds, and Milkshops Order*, 1885, *s.* 13—*Power of Local Authority to regulate Air-space.*

The power given by the Contagious Diseases (Animals) Act, 1878, and the Dairies, Cowsheds, and Milkshops Order, 1885, to local authorities to make regulations for prescribing and regulating the ventilation of dairies and cowsheds, permits a local authority to make regulations respecting air-space in such places.

CASE stated by justices under the Summary Jurisdiction Acts.

The appellant Henry Baker was a cowkeeper, and was convicted on April 20, 1897, for having caused a greater number of cattle to be at one time kept in a building used as a cowshed than admitted of the provision of 800 cubic feet of air-space for each cow.

By the Contagious Diseases (Animals) Act, 1878, s. 34, the Privy Council (1) is empowered to make orders authorizing a local authority to make regulations (inter alia) for prescribing and regulating the lighting, ventilation, cleansing, drainage, and water supply of dairies and cowsheds in the occupation of persons following the trade of cowkeepers or dairymen.

By an Order in Council made under this section on June 15, 1885, and which came into operation on June 30, 1885, s. 7, "It shall not be lawful for any person following the trade of a cowkeeper . . . . to begin to occupy as a . . . . cowshed any building not so occupied at the commencement of this Order unless and until he first makes provision, to the reasonable satisfaction of the local authority, for the . . . . ventilation, including air-space, of the same."

By s. 8, "It shall not be lawful for any person following the trade of cowkeeper . . . . to occupy as a . . . . cowshed any building whether so occupied at the commencement of this Order

(1) These powers are by 49 & 50 Vict. c. 32, s. 9, transferred to the Local Government Board, and by 52 & 53 Vict. c. 30, s. 2, to the Board of Agriculture.

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or not if and as long as the . . . . and the ventilation including air-space . . . . thereof are not such as are necessary or proper for the health and good condition of the cattle therein. . . ."

By s. 13, "A local authority may from time to time make regulations . . . . for prescribing and regulating the lighting, ventilation, cleansing, drainage, and water supply of dairies and cowsheds in the occupation of persons following the trade of cowkeepers or dairymen. . . ."

Acting on this, the mayor, aldermen, and burgesses of the borough of Southport, as the urban sanitary authority for that borough, made (inter alia) the following regulation: "Every person following the trade of a cowkeeper . . . . shall not cause or suffer any greater number of cattle to be at any time kept in a building used as a . . . . cowshed than will admit of the provision of 800 cubic feet of free air-space for each cow."

The appellant was convicted for a breach of this regulation.

*Moulton, Q.C.* (*Pickford, Q.C.*, and *Horridge*, with him), for the appellant. The regulation is ultra vires and void. Neither the Act nor the Order in Council gave any power to the local authority to make regulations respecting air-space. Ventilation and air-space are entirely different things, and this difference is recognised by ss. 7 and 8 of the Order in Council. The fact that in those two sections the word "ventilation" is followed by the words "including air-space," while in s. 13 nothing is said about air-space, shews that it was not intended to give the local authority the power to regulate air-space.

*Macmorran, Q.C.* (*G. H. Pollard* with him), for the respondent. The regulation is good. The word "ventilation" must be taken both in the Act and the Order in Council to include air-space. Sect. 13 of the Order in Council merely carries out in detail s. 8, and its object is that cowkeepers may know from the regulations framed by the local authority exactly what the requirements are which must be met.

*Moulton, Q.C.*, in reply, cited *Institute of Patent Agents* v. *Lockwood.* (1)

*Cur. adv. vult.*

(1) [1894] A. C. 347.

Nov. 1. WRIGHT J. By s. 34 of the Contagious Diseases (Animals) Act, 1878, power was given to the Privy Council to make orders authorizing a local authority to make regulations for (amongst other things) regulating "the ventilation of dairies and cowsheds." By s. 58, "Every Order of Council shall have effect as if it had been enacted by this Act." Under the powers so given the Privy Council in 1885 made an order ss. 7 and 8 of which dealt with "ventilation, including air-space," and s. 13 of which gave power to local authorities to make regulations respecting (amongst other things) "ventilation." [The learned judge read these sections.] The question that we have to decide is whether the power delegated by the Privy Council to the local authority by s. 13 of the order, to make regulations as to the ventilation of dairies and cowsheds, includes a power over air-space. It is certainly strange that in ss. 7 and 8 of the Order in Council the words "including air-space" are expressly put in after the word "ventilation," while in s. 13 the word "ventilation" stands by itself. It may be that the omission of air-space from s. 13 is intended to have the effect of excluding it from the purview of the local authority. It may be, on the other hand, that the words "including air-space" in ss. 7 and 8 are intended to be a definition of the word "ventilation" throughout the order. However, the local authority for the borough of Southport, purporting to act under the powers so delegated to them, have made a regulation as to the air-space which it shall be necessary to provide in all cowsheds within their jurisdiction. [The learned judge read the regulation.] The question is whether that regulation is ultra vires or not. The justices have held that it is valid and binding, and have convicted the appellant for a breach of it.

It is to be observed that by s. 58 of the Act of 1878 the Order in Council is to have the same effect as if it were enacted by the Act itself. What, then, is the effect of that provision on the question of the regulation of air-space? The case of the *Institute of Patent Agents* v. *Lockwood* (1), to which we have been referred, suggests that in such a case the proper canon of

(1) [1894] A. C. 347.

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Wright J.

construction is to read the original Act and the subordinate legislation together as if they were one Act and were to be construed together. That seems to me the right principle to adopt. Doing that, we find that the principal Act authorizes the regulation of "ventilation," and the subordinate legislation, the Order in Council, deals in two places with "ventilation, including air-space," and in a third with "ventilation" pure and simple. Reading the two together, it seems to me that there is no such inconsistency as to make s. 13, if the word "ventilation" is there construed as including air-space, at variance with the principal Act. Sects. 7 and 8 of the Order in Council shew that ventilation in the order includes air-space, and I see no reason why it should not be construed as including air-space also in s. 13. If there is any hardship, s. 14 of the order gives power to the Privy Council—and now I presume to the Board of Agriculture—to cancel any regulation if it is of too restrictive a character or otherwise objectionable. I am, therefore, of opinion that the justices were right, and that their decision must be upheld.

KENNEDY J. The only question that we have to decide in this case is whether the regulation of the local authority dealing with air-space is ultra vires or not. It seems to me that, without repeating what has been said by my brother Wright on the construction of the Act of Parliament and the Order in Council, there is nothing that satisfies me that a regulation made by a local authority in pursuance of the powers delegated by the Act and order may not deal with air-space. Sects. 7 and 8 of the Order in Council interpret "ventilation" as including air-space. Does the word "ventilation," when it is used alone in s. 13 exclude air-space? It is no doubt a difficult question to answer; but since I see nothing in the Act or order which compels me to hold that "ventilation" in s. 13 does not include air-space, I think it may fairly be given its inclusive meaning, and that the power of regulating ventilation given to the local authority includes the power of regulating air-space. If the argument of convenience may be looked at, I think it is certainly more satisfactory that the local authority

should fix a definite minimum standard of requisite cubic air rather than that the cowkeeper should not know what the requirements were. It seems to me, therefore, that there is no reason why the powers of s. 13 should not be given their wider meaning, and that the regulation is valid.

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BAKER v. WILLIAMS.
Kennedy J.

*Appeal dismissed.*

Solicitors for appellant: *Pritchard, Englefield & Co., for Mather, Liverpool.*

Solicitor for respondent: *J. Davies Williams, Southport.*

A. P. P. K.

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## SEA INSURANCE COMPANY *v.* BLOGG.

1897
*Nov.* 2, 5.

*Insurance—Marine—Attachment of Risk—Ships "sailing" on or after a specified Date.*

In an action on a policy of marine insurance on goods in ships "sailing on or after March 1," it appeared that the ship in question, having cleared the Custom House, finished loading her cargo about ten o'clock at night on February 29, and was then ready to go to sea, but by a regulation of the port ships were not allowed to leave the port after dark. The master, however, with the object of keeping his crew on board so as to be ready to start early in the morning, moved away from the wharf about five hundred yards out into the river and there anchored. In so moving the ship he placed her in a slightly more advantageous position for starting than she would have been in had she remained at the wharf, but the gaining of such advantage was no part of the master's motive in moving her. On the following morning, March 1, she proceeded on her voyage:—

*Held*, that the ship "sailed" on March 1, and not on February 29, and that the policy attached.

TRIAL before Mathew J. without a jury.

By a policy of reinsurance the plaintiffs became insured by the defendant and other underwriters at and from ports in the United States to ports in Europe on goods per "steamers as attached sailing on or after March 1, 1896." Amongst the declarations attached to the policy was one for 3000*l.* on flour per S.S. *Massacoit*, on a voyage from Newport News, James River, Virginia, to London. The *Massacoit* completed her

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loading at the wharf at Newport News between nine and ten o'clock at night on February 29, 1896, and, having previously cleared the Custom House, she was then ready to proceed to sea. Pilotage is compulsory upon foreign-going vessels in the James River, and by the pilotage regulations such vessels are not permitted to go to sea after dark owing to the difficulties of navigation and the absence of lights in the river. At ten o'clock the master moved the vessel out from the wharf about five hundred yards into the stream, and there anchored till morning. His object in so doing was to keep his crew together and prevent them from going ashore and getting drunk. Vessels can leave the wharf at any time in the morning after daybreak, and one starting from her anchorage in the stream would have at the most half-an-hour's advantage in reaching the river mouth over one starting from the wharf side. The gaining of such slight advantage was no part of the master's motive in moving out into the stream. On the following morning, March 1, about eight o'clock, the ship weighed anchor and proceeded to sea.

She was subsequently lost in the course of her voyage. In an action on the policy the defendant pleaded that the loss was not covered by the policy.

Nov. 2. *Joseph Walton, Q.C.*, and *Carver*, for the plaintiffs. The master did not mean to sail when he left the wharf, but only to lie. If he had once started with the intention of proceeding on the voyage forthwith, and had been delayed in the river by something accidental and unforeseen, he would nevertheless have sailed. The general principle is thus stated in Phillips on Insurance, 3rd ed. vol. i. s. 772: "A vessel has 'sailed' the moment she is unmoored and got under way, in complete preparation for the voyage, with the purpose of proceeding to sea without further delay at the port of departure." And in *Lang* v. *Anderdon* (1) Abbott C.J. says that the ship's raising of her anchor and moving onwards is not a sailing "unless at the time of the performance of these acts she has everything ready for the performance of the voyage, and such acts are

(1) (1824) 3 B. & C. 495, at p. 499.

done as the commencement of it." (1) The rule stated in Arnould, 6th ed. p. 610, is to the same effect: "If a ship . . . . quits her moorings . . . . being then perfectly ready to proceed on her sea voyage, and removes, though only to a short distance with the bonâ fide intention of at once prosecuting such voyage, that is a sailing." To constitute a sailing both conditions must be satisfied—that of readiness and that of intention to proceed without delay. Here, though the ship was ready, the master did not intend to proceed at once. In *The Cachapool* (2), where a barque was towed out of dock into the river in order that she might proceed to sea on the following morning, and a collision occurred while she was at anchor, it was held that she was not "proceeding to sea" within the meaning of an Act which compelled vessels so proceeding to have a pilot on board.

*Sir W. Phillimore*, and *Scrutton*, for the defendant. It is enough that the ship was ready for sea and left the wharf. In *Pittegrew* v. *Pringle* (3) Lord Tenterden says: "The general principle of the decisions is this: that if a ship quits her moorings and removes though only to a short distance, being perfectly ready to proceed upon her voyage, and is by some subsequent occurrence detained, that is nevertheless a sailing." He says nothing there about an intention to proceed at once. It makes no difference whether the occurrence which delays the ship is foreseen or unforeseen. In *Cockrane* v. *Fisher* (4), where a ship was hauled out of dock and warped down the river about half a mile towards the mouth, on a day when owing to the state of the wind it was impossible to get to sea, it was held that if the master did so with the object of putting the ship in a more favourable position for prosecuting her voyage, and not merely for the purpose of a colourable compliance with a warranty to sail on that day, the vessel had sailed. There the master knew at the time he left the dock that he could not proceed to sea without further delay. No

(1) The citation of this passage in Arnould, 6th ed. p. 614, "*at* the commencement of it," is a misprint.

(2) (1882) 7 P. D. 217.

(3) (1832) 3 B. & Ad. 514, at p. 520.

(4) (1834) 2 C. & M. 581; (1835) 1 C. M. & R. 809.

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distinction can be drawn between the cause of the delay in that case and that in the present. In each it was equally foreseen. And here, as in that case, the master put his ship in a more favourable position for prosecuting his voyage. The case resembles that of *Wood* v. *Smith* (1), where a ship was taken out of dock for the purpose of anchoring in the river in such a position as would enable her to cross the bar on next morning's tide, and it was held that she was "proceeding to sea" at the time she left the dock. *The Cachapool* (2) is distinguishable, for there the barque at the time of the collision was waiting to have some repairs executed upon her, so that she was not ready to go to sea.

*Walton, Q.C.*, in reply.

*Cur. adv. vult.*

Nov. 5. MATHEW J. This was an action to recover a total loss on a policy of reinsurance on goods by the S.S. *Massacoit* on a voyage from Newport News, James River, Virginia, to the United Kingdom. The policy was in continuation of another which expired on February 29, 1896, and contained a clause confining the insurance to vessels sailing on or after March 1, 1896. It appeared from the evidence that the vessel finished her loading at a wharf in the river on February 29 at about 10 o'clock at night. She was then moved about 500 yards into the river. There was a regulation of the port that vessels should not leave after dark, because of the absence of proper lights in the river; and the ship's husband had given orders that the vessel should not start on her voyage before daylight on March 1. The master in moving the vessel into the stream had no intention to commence the voyage. His object was to get away from the wharf so as to leave room for other vessels, and to keep his crew together and prevent their going ashore. Some slight advantage might have been obtained for the ship in starting from the river instead of from the wharf, but there is no reason to suppose that this consideration entered into the calculations of the master. It was contended for the plaintiffs that the vessel sailed within the meaning of the policy on

(1) (1874) L. R. 5 P. C. 451. (2) 7 P. D. 217.

March 1. For the defendant it was urged that the vessel had made a start when fully prepared for the voyage on February 29, and that the vessel, therefore, was not covered by the policy. The law is thus stated in Phillips on Insurance, 3rd ed. s. 772: "A vessel has 'sailed' the moment she is unmoored and got under way, in complete preparation for the voyage, with the purpose of proceeding to sea, without further delay at the port of departure." And the author quotes from Lord Mansfield (*Thellusson* v. *Staples* (1)) as follows: "To constitute a sailing under this warranty the vessel at the time of sailing must be, in the contemplation of the captain, at absolute and entire liberty to proceed to her port of delivery in a mathematical line if it were possible."

Upon the argument the cases collected in 2 Arnould, 6th ed. pp. 608–620, were fully discussed. For the plaintiffs reliance was placed on the case of *Lang* v. *Anderdon* (2), which was contrasted with *Wood* v. *Smith* (3) and *The Cachapool*. (4) It was said that without an intent to proceed to sea in a direct course there was no sailing within the meaning of the policy. On the other hand, the defendant's counsel mainly relied on *Cockrane* v. *Fisher*. (5) The vessel, it was said, when fully prepared for sea, was placed by the master in a better position for prosecuting her voyage, and had, therefore, sailed before the day limited. But, as is pointed out in the judgments in that case, the question whether the warranty was complied with depended upon the intention of the master when the vessel left her moorings. And upon the finding of the jury that the master meant from the first to prosecute the voyage, it was there held that the warranty was complied with, although in the then state of the weather the vessel could not get to sea. There is no authority for the proposition that there could be a sailing as required by the policy without a clear intention on the part of the master to proceed directly on his voyage. Any obstacle which was foreseen, and which would cause delay in getting the vessel to sea, would postpone the time of sailing until the

(1) (1780) 1 Doug. 366, n.
(2) 3 B. & C. 495.
(3) L. R. 5 P. C. 451.
(4) 7 P. D. 217.
(5) 2 C. & M. 581; 1 C. M. & R. 809.

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obstacle was removed. What the *Massacoit* did was, not to sail on February 29, but to shift her berth with a view to sailing on March 1. The plaintiffs are, therefore, entitled to judgment for the amount claimed and costs.

*Judgment for the plaintiffs.*

Solicitors for plaintiffs: *Rowcliffes & Rawle.*
Solicitors for defendant: *Waltons, Johnson, Bubb & Whatton.*

J. F. C.

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*Nov.* 24.

## CHANDLER *v.* BLOGG.

*Insurance (Marine)—Policy—Reinsurance—Collision Clause—Collision with sunken Barge.*

The plaintiff underwrote a time policy on a steamer, containing a clause that if the steamer should come into collision with any other vessel, and the insured should have to pay damages, the insurers would pay.

The defendant underwrote a policy of reinsurance, on the same steamer, for the same period, subject to the same clauses and conditions as the original policy, and to pay as might be paid thereon, but only to pay all claims for loss or damage done or received through collision.

During the period covered the steamer struck a barge, which had just been sunk by collision with another vessel, and the steamer was damaged. The barge was raised next day, and sailed to her home port, and was repaired:—

*Held*, that, although, at the moment when the steamer struck her, the barge could not have been navigated, yet, as she became navigable as soon as she was raised, there was a collision between two navigable vessels, in respect of which the plaintiff was entitled to recover on the policy of reinsurance.

COMMERCIAL CAUSE.

A special case was stated, of which the material parts were as follows:—

The plaintiff sued on behalf of underwriters at Lloyd's, who in the course of their business had underwritten policies of insurance on the steamship *Newburn*, by which she was insured to the total amount of 300*l.* for twelve calendar months, commencing at noon on February 20, 1894. The policies were

in the usual Lloyd's form, and contained a collision clause, which was in the following terms:—

"And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay, by way of damages to any other person or persons, any sum or sums, not exceeding, in respect of any one such collision, the value of the ship hereby insured, we the assurers will severally pay the assured such proportion of three-fourths of such sum or sums so paid as our respective subscriptions hereto bear to the value of the ship hereby insured."

The defendant was an underwriter at Lloyd's, and on March 1, 1894, he underwrote for one-sixth of the insured amount a policy of insurance in the ordinary Lloyd's form, by which the plaintiff, and those for whom he acted, caused themselves to be insured on the steamship *Newburn*, for the sum of 60*l*., for the period of twelve calendar months above mentioned. This policy was therein declared to be a reinsurance, subject to the same clauses and conditions as the original policy, and to pay as might be paid thereon, but only to pay all claims for loss or damage done or received through collision.

On March 12, 1894, the defendant underwrote another policy of reinsurance on the *Newburn* in the same terms as the policy of March 1.

On December 2, 1894, during the continuance of the risk insured by the above-mentioned policies, the *Newburn*, while swinging off Regent's Canal in the River Thames, struck with her port side abreast the engine-room the sailing barge *Lizzie*, which had just been sunk by collision with the steamship *Lodore*. The *Newburn* remained fast on the *Lizzie* for several hours, and while she so remained fast she was run into by the steamship *Senior*, and also by barges laden with coal, which drove across her stern, striking her heavily aft under the counter. The *Lizzie* was raised on December 3, and having sustained comparatively small damage, at once sailed to Faversham, her home port, and was there repaired by her owners.

Upon the *Newburn* being placed in dry dock for survey, it

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was found that, by reason of some or one of the accidents above mentioned, she had received considerable damage to the rudder, and the sole piece of the stern frame, and to the flat of the bottom, and to her propeller, and the plaintiff, or those in whose behalf he sued in respect of the policies on the *Newburn* underwritten by them, had respectively paid a loss at the rate of 20*l.* 10*s.* 1*d.* per cent. in respect of such damage.

The plaintiff contended that the whole damage received by the *Newburn* in respect of the events aforesaid was damage received through collision, and that the *Newburn* was in collision with the *Lizzie*, within the meaning of the policies.

The defendant admitted liability to his proportion of the loss (if any) sustained by reason of the collisions between the *Newburn* and the steamship *Senior*, and the coal-laden barges, respectively, but contended that the contact between the *Newburn* and the sunken barge *Lizzie* was not "collision with any other ship or vessel," within the meaning of the policies.

*Robson*, *Q.C.* (*Scrutton* with him), for the plaintiff. The plaintiff is entitled to recover on the policies of reinsurance, as for damage caused by collision between the *Newburn* and the *Lizzie*. It is clear that there may be a collision where the impact of the vessel which suffers damage is with a stationary object: *Union Marine Insurance Co.* v. *Borwick*. (1) In his judgment in that case Mathew J. said: "I cannot distinguish collision with from striking against." The language of Lord Herschell in *The Zeta* (2) also supports the plaintiff's contention. He said: "The cause of action which the respondents established was that their vessel had sustained damage owing to a collision with the dock wall of the appellants." Words are sometimes used which limit the meaning of the word collision, but here in the policies of reinsurance the expression is general. If, however, in order to bring the case within the policies of reinsurance, it is necessary that there should have been a collision between two vessels, this condition is fulfilled. It is clear that there can be a "collision" between a vessel

(1) [1895] 2 Q. B. 279. (2) [1893] A. C. 468, at p. 476.

under way and a vessel at anchor (1), and in the same way there can be a collision with a vessel which is submerged or partially submerged, but can again be navigated as soon as she has been raised and floated, as was done with the *Lizzie*. [He also referred to *The Douglas* (2); *The Munroe* (3); *The Utopia*. (4)]

*Joseph Walton, Q.C.*, and *Joseph Hurst*, for the defendant. There was no damage by collision, within the meaning of the policies of reinsurance. Where, as here, the expression used is "collision" simply, without any further words, what is meant is a collision with another vessel, or, at least, with some navigable thing, such as a raft. Where other words have been added, as was done in the cases which have been cited for the plaintiff, the intention has been to extend the meaning of the word collision, not to limit it. For instance, in *Union Marine Insurance Co.* v. *Borwick* (5) the words were "loss or damage through collision with . . . . piers or stages or similar structures," and Mathew J. said: "The expression 'collision with piers or stages or similar structures' covers the present case." It is clear, therefore, that his judgment was based on those additional words. Here the *Lizzie* was for the time being nothing more than a sunken wreck.

[They also referred to *Hough* v. *Head* (6); *Reischer* v. *Borwick* (7); *Barraclough* v. *Brown*. (8)]

*Robson, Q.C.*, was not heard in reply.

BIGHAM J. I am of opinion that my judgment ought to be in favour of the plaintiff. The question to be determined is whether, on two policies of reinsurance, the defendant is liable, under the circumstances stated in the special case, as for damage caused by collision. I am disposed to agree with Mr. Walton's contention, that "collision," when used alone, without other words, means two navigable things coming into

(1) See *The Annot Lyle*, (1886) 11 P. D. 114; *The Indus*, (1886) 12 P. D. 46; *The City of Peking*, (1888) 14 App. Cas. 40.

(2) (1882) 7 P. D. 151.

(3) [1893] P. 248.

(4) [1893] A. C. 492.

(5) [1895] 2 Q. B. 279.

(6) (1885) 54 L. J. (Q.B.) 294.

(7) [1894] 2 Q. B. 548.

(8) [1897] A. C. 615.

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contact. In the present case the *Lizzie* was a barge, which happened to have been sunk, and therefore could not have been navigated at the moment when that which the plaintiff contends was a collision took place. If one takes the case of a vessel at anchor, which has taken the ground at low water, it is clear that she cannot be navigated until the tide rises and floats her. Or take the case of a vessel the rudder of which has been unshipped, she cannot be navigated until her rudder has been shipped again. Yet in neither of the cases which I have suggested could it properly be said that there was not a vessel, or that the vessel was not navigable. I am of opinion that, although the *Lizzie* could not have been navigated during a period of a few hours, that is, until she was raised and floated, nevertheless she was a vessel, and was navigable, within the meaning of the definition which has been suggested, and therefore what took place comes within Mr. Walton's own definition of a collision. The result is that there will be judgment for the plaintiff for his claim in respect of the damage caused to the *Newburn* by the collision with the *Lizzie*.

*Judgment for the plaintiff.*

Solicitors for plaintiff: *Thomas Cooper & Co.*
Solicitors for defendant: *Pritchard & Sons.*

P. B. H.

[IN THE COURT OF APPEAL.]

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*Oct.* 27, 30.

## STERN *v.* TEGNER.

*Bill of Sale—Execution—Sale of Goods by Sheriff—Order* LVII., *r.* 12—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11.

A debtor gave a bill of sale of goods as security for a loan. The sheriff having taken the goods in execution on behalf of a judgment creditor of the grantor, the grantee gave the sheriff notice of his claim. The sheriff took out an interpleader summons, and on the same day a receiving order in bankruptcy was made against the grantor, and he was afterwards adjudged bankrupt. The official receiver did not claim the goods under the Bankruptcy Act, 1890, s. 11, but appeared on the hearing of the interpleader summons and concurred with the judgment creditor in asking for a sale under Order LVII., r. 12, and an order for the sale was accordingly made. It appeared on the evidence that the sale of the goods by the sheriff was not likely to produce enough to pay what was due on the bill of sale:—

*Held*, that, assuming Order LVII., r. 12, not to be defeated by s. 11 of the Bankruptcy Act, 1890, a sale ought not to be ordered, and that as it was very doubtful whether the goods would realize enough to pay the bill of sale holder, and neither the official receiver nor the judgment creditor were willing to redeem or to give a guarantee against loss if the proceeds of sale proved insufficient, the proper course was to order the sheriff to withdraw:

*Semble*, that if the official receiver had asked for the delivery of the goods to him under s. 11 of the Bankruptcy Act, 1890, the operation of Order LVII., r. 12, would have been excluded, but that as he had not so done, but asked for a sale, that rule could be applied.

THIS was an appeal by the holder of a bill of sale against an order of Ridley J. for the sale of the goods comprised in it under Order LVII., r. 12.

The facts were as follows. On August 11, 1897, the defendant Tegner executed a bill of sale in favour of the appellant Smith to secure 300*l.* and interest at 3 per cent., and the day for payment was November 11, 1897. The validity of this bill of sale was not impeached. In September the landlord distrained on Tegner for rent. On September 30 the sheriff seized the goods comprised in the bill of sale at the instance of the plaintiff Stern, who had obtained a judgment against Tegner. On October 1 the claimant Smith sent in his claim under his

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bill of sale. He shortly afterwards paid off the landlord. On October 7 the sheriff took out the ordinary interpleader summons. A receiving order in bankruptcy was made against Tegner on the same day. On October 15 Tegner was adjudged bankrupt. The official receiver did not ask to have the goods delivered to him under s. 11 of the Bankruptcy Act, 1890, but appeared in the interpleader proceedings and requested a sale. The official receiver and the execution creditor declined to redeem, or to give any guarantee against loss if the sale did not produce enough to pay the secured debt. A sale was ordered by the master on October 15, but on October 19 Ridley J. varied this order, and under Order LVII., r. 12, directed the sheriff to sell the goods and hold the net proceeds to abide the further order of the Court.

Smith appealed from this order.

*Herbert Reed, Q.C.*, and *Muir Mackenzie*, for the appeal. The Court had no jurisdiction to order a sale. The Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 11, sub-s. 1, provides that where a receiving order has been made the sheriff is to hand over the goods to the official receiver. This enactment overrides Order LVII., r. 12, and prevents the making an order for the sheriff to sell. The official receiver is entitled to the goods subject to the claim of the bill of sale holder: *Ex parte Halling, In re Haydon.* (1) The execution ceases to be effective, and Order LVII., r. 12, no longer applies. *Forster* v. *Clowser* (2) is relied on in support of the order; but in that case there was no bankruptcy, and the Court was satisfied that the value of the goods was fully sufficient to satisfy the security. Here the evidence shews that it is doubtful whether the goods will sell for enough to pay the security, and the Court cannot speculate on a probable rise in value: *Merchant Banking Co.* v. *London and Asiatic Bank.* (3) By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 9, sub-s. 2, a receiving order is not to affect the power of a secured creditor to deal with his security, and by s. 45 of the same Act an execution creditor loses the benefit of

(1) (1877) 7 Ch. D. 157. (2) [1897] 2 Q. B. 362.
(3) (1886) 55 L. J. (Ch.) 479.

his execution as regards goods unless he has completed it by seizure and sale before the date of the receiving order. The bill of sale holder ought to be allowed to make the most of his doubtful security in his own way.

*Carrington*, for the official receiver. There was jurisdiction to make this order, and it is a right order. The terms of Order LVII., r. 12, are general, and, taking them as they stand, this case is clearly within them. It is said that the execution has ceased to be effective owing to the bankruptcy, and that therefore the power is gone; but there is nothing in bankruptcy to take away the power. Where a claim is made to the goods by a bill of sale holder, s. 11 of the Act of 1890 cannot apply, for it never can have been the intention of the Legislature that the goods should be given over to a person who has not the best title to them. The appellant aims at construing s. 9 of the Act of 1883, which only preserves his existing rights, as giving him a benefit which he had not before.

*J. P. Earle*, for the execution creditor, contended that he ought not to pay the sheriff's costs.

*Rose Innes*, for the sheriff. If the appellant succeeds, the execution creditor ought to pay the sheriff's costs, for he suggested to the sheriff to take out an interpleader summons.

*H. Reed, Q.C.*, in reply. *Ex parte Halling, In re Haydon* (1), shews that is the duty of the sheriff to hand over the goods to the official receiver subject to the claim of the holder of the bill of sale. It has been contended on behalf of the official receiver that the words of Order LVII., r. 12, are clear, and must be applied according to their plain meaning; but the language of the rule is permissive, and a sale will not be ordered where it would do injustice to the holder of a bill of sale.

*Cur. adv. vult.*

Oct. 30. LINDLEY M.R. (after stating the facts) proceeded as follows:—The execution creditor is relying with the trustee in bankruptcy upon the right to have this property sold under Order LVII., r. 12, which I will read in a moment. The case is

(1) 7 Ch. D. 157.

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distinguishable, so far as I know, from any former case by reason of the operation of s. 11 of the Bankruptcy Act, 1890, which was relied on very strongly by counsel for the appellants as rendering Order LVII., r. 12, inapplicable to the present case.

I will first read s. 11 of the Bankruptcy Act, 1890: "Where any goods of a debtor are taken in execution, and before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge."

What was done here is very curious. The trustee in bankruptcy has not asserted his right to the goods under s. 11: in other words, he has not requested the sheriff to deliver the goods to him nor to pay the money to him. But what he has done is this. He has appeared on the interpleader proceedings, and he has, so to speak, made use of the execution creditor's judgment in order if he can to compel the sale of these goods under Order LVII., r. 12. Before I had read s. 11 as carefully as I have since done, I was rather impressed by the argument addressed to us by the appellant, that the bankruptcy put an end to the execution. On further consideration I am of opinion that it only does so at the option of the trustee. If he chooses to assert his rights the execution creditor seems to me to have no rights; but if the trustee takes the course which he has taken of not asserting his rights, but of backing up the execution creditor for the obvious purpose of inducing the Court to make an order which it otherwise would have no jurisdiction to make, then it appears to me that s. 11 does not invalidate the execution.

Now I come to Order LVII., r. 12: "When goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the High Court, and any claimant alleges that he is entitled, under a bill of sale or

otherwise, to the goods or chattels by way of security for debt, the Court or a judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just." That rule is copied and reproduced with slight variations from s. 13 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), the object of which is very concisely stated thus by Day J. (Day on the Common Law Procedure Acts, 4th ed. p. 361): "This section confers new and valuable powers. Hitherto if the claimant established a title to goods of however great value by way of security for however small a sum the execution was defeated absolutely, as the Court had no power to provide for the realization of the security and the disposal of the surplus, or for the payment of the debt and discharge of the security by the execution creditor. This defect is now mended, and a convenient and much-used scheme for defeating creditors is interrupted."

Then comes the question, How are we to deal with this rule under the circumstances of the present case? I am not prepared to say that the course taken by the trustee in bankruptcy is illegal or improper, and I am not prepared to say that Order LVII., r. 12, cannot be invoked, having regard to what has been done in the present case. If the trustee had asserted his rights against the execution creditor under s. 11 of the Bankruptcy Act, 1890, I doubt whether Order LVII., r. 12, would have been applicable. My present impression is that it would not; but the trustee has not asserted such rights, and I will assume that Order LVII., r. 12, can be still invoked by him and the execution creditor. But Order LVII., r. 12, was not intended to deprive secured creditors of the benefit of their security, and when this will, or very likely will, be the effect of a sale, the Court ought not to direct the sale, but ought to direct the sheriff to withdraw. There are three cases which arise in practice. First of all, the case where the security is ample and where the bill of sale holder tries to assert his rights so as to defeat the execution creditor. That is the common case which s. 13 of the Common Law Procedure Act, 1860, was intended to rectify. The bill of sale holder cannot stand

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upon his rights when it is plain that he is defeating the execution creditor, which, of course, involves the assumption that after paying off the bill of sale there will be something left. That is a plain case: in such a case a sale will be ordered. The next case is where the security is plainly deficient. Then if there were a sale there would not be a surplus, whence it follows that the only proper course is to direct the sheriff to withdraw. What has the execution creditor to do with the goods if he cannot possibly get anything out of them? That is another plain case. The third case is somewhat more difficult. When it is doubtful whether the security is sufficient to pay off the secured creditor or not, what is the right course to take? The proper course in such a case is for the Court to say, "Unless the execution creditor will guarantee the secured creditor against loss by sale, we will not order the sale." Here the execution creditor and the trustee have declined to redeem, and declined to give any guarantee against any loss. That has induced me to look more carefully than I did in court into the evidence, and upon the evidence I am perfectly satisfied that if these goods are sold by the sheriff it is extremely doubtful whether there will be enough to pay the bill of sale holder. Under those circumstances, how can it be just to enforce a sale, and deprive him of his security? That would be to abuse the rule, not to put it into operation in a case to meet which it was passed.

It is said that this view is opposed to a decision of this Court in *Forster* v. *Clowser*. (1) On the contrary, it appears to me perfectly consistent with it. What the Court of Appeal there did was this: they were satisfied that upon a sale there would be enough to pay to the bill of sale holder in full what they thought he was entitled to, and that there would be a surplus left for the execution creditor, so they directed a sale. That is quite a different case. Here the conclusion at which I have arrived is that if there is an enforced sale by the sheriff, there will not be 20*s*. in the pound for the secured creditor.

Under those circumstances, it appears to me that this appeal ought to succeed. The proper order will be that the sheriff is

(1) [1897] 2 Q. B. 362.

to withdraw, and there must be no action against him. The execution creditor must pay him his costs and charges. The execution creditor and the trustee in bankruptcy must pay the appellant here and below his costs, and must bear their own costs themselves; but the order is not to prejudice the right of the trustee to have his costs out of the bankruptcy estate. We think it would be right if we could do so to give the execution creditor a second charge on these goods, so that he may be reimbursed the expenses to which he will have to be put, because he has acted with the trustee and under his direction. I am assuming there is a surplus. I do not think that we have jurisdiction to do that; but it would obviously be right if some arrangement could be made between the trustee and the execution creditor to reimburse the execution creditor the costs which he will have to pay.

CHITTY L.J. I agree.

It was argued for the appellants that the execution was wholly put an end to by the 11th section of the Bankruptcy Act, 1890; and, consequently, that Order LVII., r. 12, was no longer applicable, inasmuch as the receiving order had been made before the order for sale. It is not necessary to determine what would have been the effect of the 11th section upon the execution and the proceedings thereon, if a request had been made by the official receiver for delivery of the goods to him: as at present advised, I think that such a request would preclude proceedings by the execution creditor under Order LVII., r. 12. No such request was made; on the contrary, the official receiver and the trustee in bankruptcy both in chambers and before us supported the application for sale, and the order made on that application: in other words, they declined to avail themselves of the benefit of the 11th section. It is not easy to see how in these circumstances the secured creditor, whose rights are not affected by the receiving order and the subsequent bankruptcy, can set up this 11th section as a bar; but, again, it is unnecessary to decide this point; and I will assume against him that he cannot.

But I think that the order, assuming that there was

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jurisdiction to make it, was unjust towards him. I have carefully considered the effect of the evidence as to the value of the goods, and have come to the conclusion that the sale will not produce a sum sufficient to satisfy the just claims of the mortgagee. A forced sale of furniture by the sheriff without reserve and away from the house is notoriously a disadvantageous method of selling. In my opinion, the jurisdiction conferred by the 12th rule ought not to be exercised against the mortgagee unless there is a reasonable ground for holding that the sale will produce more than sufficient to answer the just claims of the mortgagee, so as to leave a surplus available for the execution creditor. In *Forster* v. *Clowser* (1) the judge was satisfied that there would be a surplus; the Court of Appeal saw no reason for disturbing his decision on this point; and the majority of the Court gave effect to what they considered were the substantial rights of the mortgagee. I agree also as to the order for costs.

*Appeal allowed.*

Solicitor for appellant: *W. Vant, jun.*
Solicitors for official receiver: *Barber & Son.*
Solicitors for execution creditor: *Petch & Smurthwaite.*
Solicitors for sheriff: *W. & T. Burchell.*

(1) [1897] 2 Q. B. 362.

H. C. J.

[IN THE COURT OF APPEAL.]

C. A.
1897
*Nov.* 2.

## MAYOR, ALDERMEN, AND BURGESSES OF ASHTON-UNDER-LYNE *v.* PUGH.

*Local Government—Street — Paving — Highway repairable by Inhabitants at large—Frontagers—Local Act—Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *ss.* 149, 340.

Where a local Act, passed in 1849, gave power to a municipal corporation to order that any street, whether a public highway or not, should be sufficiently sewered, drained, levelled, flagged, paved, and otherwise completed by the frontagers, and provided that, if they made default in the execution of the work, the corporation might cause the work to be executed and recover the expense incurred in respect thereof from the frontagers :—

*Held*, that the Public Health Act, 1875, s. 149, had not the effect of repealing the provision of the local Act as regards streets which were highways repairable by the inhabitants at large.

APPEAL from the judgment of a Divisional Court (Grantham and Wright JJ.) upon a special case stated in an action.

The defendant, as the rector of the parish of Ashton-under-Lyne, was the owner of land and buildings abutting upon a street called Mossley Road, in the borough of Ashton-under-Lyne, and the action was brought to recover from the defendant as such owner the amount apportioned as his share of the expenses incurred by the plaintiffs in paving, levelling, flagging, and otherwise completing the said street.

Ashton-under-Lyne is a municipal borough, of which the plaintiffs, acting by the council, are the urban sanitary authority.

The Mossley Road had been a turnpike road, but had been disturnpiked, and was a highway repairable by the inhabitants at large.

By the Ashton-under-Lyne Improvement Act, 1849 (12 & 13 Vict. c. xxxv.), the Towns Improvement Clauses Act, 1847, was, except so far as varied or otherwise provided for, incorporated with the said Act of 1849. By s. 20 of the last-mentioned Act it is enacted that, "if any street or part of a street, whether the same be a public highway or not, and whether the

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same be already or shall at any time hereafter be laid out and opened to the public within the said borough, be not or shall not be sufficiently sewered, drained, levelled, flagged, paved, and otherwise completed to the satisfaction of the mayor, aldermen, and burgesses, it shall be lawful for the mayor, aldermen, and burgesses, at any time and from time to time after the passing of this Act, notwithstanding the provisions of the Towns Improvement Clauses Act, 1847, incorporated herewith, to order that any such street, or part thereof, shall be freed from obstruction, sewered, drained, levelled, flagged, paved, and otherwise completed according to such plan, on such level, in such manner, of such materials and within such time as they shall direct, and thereupon the respective owners of the buildings and lands lying alongside of or adjoining to such street or part of a street (notwithstanding any part of such street may include, pass over, lie opposite, or be adjacent to any cross or other street or any part thereof) shall, according to such plan, on such level, of such materials, within such time, and in such manner as shall be expressed in such order, at their respective charges and expenses, remove all obstructions, and well and sufficiently sewer, drain, level, flag, pave and otherwise complete such street, so far as the same extends along their respective buildings or lands; and in the event of such owners or any of them making default in the due execution of such work within such time as aforesaid, the mayor, aldermen, and burgesses may cause such work to be executed, and may recover the expense incurred by them in respect thereof in the manner directed by the provisions of the Towns Improvement Clauses Act, 1847, with respect to ensuring the execution of the works by that or the special Act required to be done by the owners or occupiers of houses or lands, so far as such provisions apply to the recovery of the expense of work required to be done by owners, and except in so far as such provisions authorize the recovery of such expense by drainage rates."

Mossley Road not being paved, flagged, and completed to the satisfaction of the plaintiffs, on April 10, 1889, the plaintiffs, assuming to act under the powers of the local Act, ordered that the carriage-way should be concreted and paved with granite

sets, and the footways should be kerbed and flagged, and gave notice to the frontagers to do the work. The frontagers did not do the work, and thereupon the plaintiffs did it and apportioned the expense among the frontagers. The defendant having failed to pay the amount apportioned to him, the action was brought.

The Divisional Court gave judgment for the defendant. (1)

*Sir R. T. Reid, Q.C.*, and *William Graham*, for the plaintiffs. The provisions of s. 20 of the local Act are not repealed by the Public Health Act, 1875, s. 149, as regards highways repairable by the inhabitants at large. The principle "generalia specialibus non derogant" applies. In order that a general Act may repeal the special provisions of a local Act there must be some reference to them in express terms or by necessary implication indicating an intention of repealing them. In *Thorpe* v. *Adams* (2) Bovill C.J. said: "The general principle to be applied to the construction of Acts of Parliament is that a general Act is not to be construed to repeal a previous particular Act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149: "All streets being or which at any time become highways repairable by the inhabitants at large within any urban district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority. The urban authority shall from time to time cause all such streets to be levelled, paved, metalled, flagged, channelled, altered and repaired as occasion may require. They may from time to time cause the soil of any such street to be raised, lowered, or altered as they may think fit; and may place and keep in repair fences and posts for the safety of foot-passengers."

Sect. 340: "Where within the district of a local authority any local Act is in force, providing for purposes the same as or similar to the purposes of this Act, proceedings may be instituted at the discretion of the authority or person instituting the same, either under the local Act or this Act or under both, subject to these qualifications:—

"(1.) That no person shall be punished for the same offence both under a local Act and this Act; and

"(2.) That the local authority shall not, by reason of any local Act in force within their district, be exempted from the performance of any duty or obligation to which they may be subject under this Act."

(2) (1871) L. R. 6 C. P. 125.

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inconsistency in the two Acts standing together." Moreover, s. 340 of the Public Health Act shews that it was not intended by that Act to repeal the provisions of local Acts in pari materiâ with those of the Public Health Act. The second proviso to that section only means that the existence of the special provisions of the local Act is not to afford an excuse to the authority for neglecting any duty imposed upon it by the Public Health Act. It does not mean that the powers given by the local Act are taken away, for that would be inconsistent with the enacting part of the section. There is no necessary inconsistency between the local Act and the Public Health Act. The urban authority may "cause the streets to be levelled, &c.," by proceeding under the local Act. The correct principle of construction with regard to the repeal of the provisions of local Acts by general Acts is laid down in Maxwell on the Interpretation of Statutes, 3rd ed. pp. 242, 243.

*Macmorran, Q.C.*, and *R. Cunningham Glen*, for the defendant. It is contended that the defendant is not liable in respect of the work done to Mossley Street, that street being a highway repairable by the inhabitants at large. Sect. 149 of the Public Health Act expressly makes it the duty of the urban authority to do such work. The natural and ordinary meaning of the expression "cause to be levelled, &c.," used in that section is that the authority is to do the work at its own expense. That section is inconsistent with the provisions of s. 20 of the local Act so far as they relate to highways repairable by the inhabitants at large, and therefore to that extent repeals them. The second proviso to s. 340 of the Public Health Act enacts that the provisions of a local Act are not to exempt the authority from any duty imposed upon them by the Public Health Act. The duty of doing these works in the case of highways repairable by the inhabitants at large is thrown upon the urban authority by the Public Health Act. There is therefore a distinct reference to such provisions in local Acts as those of s. 20 of the Act of 1849 so far as they relate to highways repairable by the inhabitants at large indicating an intention to repeal them.

*Sir R. T. Reid, Q.C.*, in reply.

A. L. SMITH L.J. The contention is that the provision of the local Act of 1849, so far as it related to highways repairable by the inhabitants at large, was repealed by the Public Health Act of 1875. I cannot accede to that contention. The Public Health Act is a general Act. The passage which was cited from Maxwell on the Interpretation of Statutes correctly lays down the rule as to the repeal of special enactments by a general statute and the reasons for it. In *London and Blackwall Ry. Co.* v. *Limehouse District Board of Works* (1) Page Wood V.-C. expresses the rule as follows: "Whenever the Legislature has by such an Act vested powers of a special character in a corporate body or any body of commissioners for the express purpose of carrying out a particular object which the Legislature has in view, no subsequent statute in merely general terms giving powers which by their generality apply to the special powers conferred by the former Act will override the special powers thereby delegated to the particular body of commissioners or corporation." The rule has been laid down in similar terms in other cases—for example, by Bovill C.J. in *Thorpe* v. *Adams*. (2) In addition to that general rule another reason exists for holding that it was not intended by the Public Health Act, 1875, to repeal local Acts of this kind: for s. 340 of this Act shews clearly that the intention of the Legislature was that such Acts should remain in force. For these reasons, I think the appeal should be allowed.

RIGBY L.J. I agree. The question raised is as to the effect of the Public Health Act, 1875, on the provisions of s. 20 of the local Act of 1849. With regard to that question, I cannot bring myself to entertain any doubt. The Public Health Act is a general Act, and mere general provisions therein contained, according to the well-known rule, must not be taken as repealing the special provisions of a local Act; and, moreover, when I look at s. 149 of the Public Health Act, I really do not find in its provisions anything to raise any question as to the repeal of s. 20 of the local Act. Sect. 149 imposes on the urban authority the duty of causing streets which are highways repairable by the

(1) (1856) 3 K. & J. 123. (2) L. R. 6 C. P. 125.



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inhabitants at large to be levelled, paved, metalled, channelled, altered, and repaired; but that provision does not conclude the question on whom the expense of such works is to fall, and, if the authority cause the work to be done by putting in force the provisions of the local Act, they satisfy the duty imposed upon them by the section. Therefore, looking only at s. 149, I do not find even a primâ facie case to shew that the right given to the corporation by the local Act is taken away. But, when I come to s. 340, I find that it is expressly provided that the authority shall have an option of proceeding under any local Act providing for purposes the same as or similar to the purposes of the Public Health Act. I agree with the contention of the plaintiffs' counsel that the second proviso of s. 340 does not shew any intention to repeal such an enactment as that of the local Act of 1849. All it means is that the authority shall not set up the existence of the provisions of the local Act as an excuse for not performing the duty imposed upon them by the Act. It appears to me that the Public Health Act clearly reserves the rights of an urban authority under such an enactment as that of the local Act of 1849.

COLLINS L.J. I entirely agree with the conclusion arrived at by the other members of the Court, and the reasons which they have given for that conclusion. The case comes directly within the principle enunciated by Page Wood V.-C. in *London and Blackwall Ry. Co.* v. *Limehouse District Board of Works.* (1) Moreover, if the general rule so laid down were not sufficient to shew that the provision of the local Act remains unrepealed, the saving clause contained in s. 340 of the Public Health Act seems to me to make the matter perfectly clear.

*Appeal allowed.*

Solicitors for plaintiffs: *Sharpe, Parkers & Co., for Charles Gartside, Ashton-under-Lyne.*

Solicitors for defendant: *Bower, Cotton & Bower, for H. G. Hall, Ashton-under-Lyne.*

(1) 3 K. & J. 123.

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1897
*Nov.* 15.

## TOWNEND *v.* KIRKHAM.

*Practice—District Registry, Action in—Setting aside Judgment in Default of Appearance—Jurisdiction of Registrar—Order xxxv., rr.* 1-6.

A district registrar has by virtue of Order xxxv., r. 6, jurisdiction concurrent with that of a master under the rules to set aside or vary a final judgment signed in default of appearance in an action proceeding in the district registry.

*Hood & Sons* v. *Yates*, [1894] 1 Q. B. 240, commented upon.

APPEAL from an order of a judge at chambers setting aside an order of a district registrar.

In an action brought in the Manchester District Registry, the writ being specially indorsed with a claim for a balance due upon a promissory note, the plaintiff signed judgment for 29*l.* 9*s.* in default of an appearance by the defendant. Upon an application to the district registrar by the defendant to set the judgment aside on the ground that it was improperly signed for too large a sum by reason of the correct amount not having been credited to the defendant in respect of payments made by him on account, the registrar ordered the judgment to be varied by reducing the amount for which it was entered to 22*l.* On appeal to a judge at chambers he reversed the order of the registrar on the authority of *Hood & Sons* v. *Yates* (1), upon the ground that the registrar had no jurisdiction under the rules to set aside a final judgment. (2)

(1) [1894] 1 Q. B. 240.

(2) Order xxxv., r. 1: "Where a cause or matter is proceeding in a district registry, all proceedings, except where by these rules it is otherwise provided, or the Court or a judge shall otherwise order, shall be taken in the district registry, down to and including the entry of final judgment, and every final judgment and every order for an account, by reason of the default of the defendant, or by consent, shall be entered in the district registry in the proper book, in the same manner as a like judgment or order in an action proceeding in London would be entered in the central office."

Rule 4: "Where a cause or matter is proceeding in a district registry, all writs of execution for enforcing any judgment or order thereon, and all summonses under the Debtors Act, 1869, shall issue from the district registry, unless the Court or a judge shall

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*Montague Lush*, for the defendant. The district registrar had, by virtue of Order XXXV., r. 6, the jurisdiction of a master under the rules to set aside the judgment. Order XXXV., r. 1, provides that, where an action is proceeding in a district registry, all proceedings, except where by the rules it is otherwise provided, or the Court or a judge shall otherwise order, "shall" be taken in the district registry down to and including the entry of final judgment. That rule is dealing with the proceedings in such an action down to final judgment, and makes it compulsory that they should be taken in the district registry, but it does not mean that the registrar is to have no jurisdiction over the action after final judgment, for rule 4 provides that in such actions all writs of execution and judgment summonses "shall" issue from the district registry, which clearly shews that the jurisdiction of the registrar is not intended to be at an end upon final judgment being signed; and rule 5 provides that, where a cause or matter is proceeding in a district registry, certain proceedings therein specified, some of which are subsequent to final judgment, "shall" be taken in the district registry, unless the Court or a judge shall otherwise order. By rule 6, where a cause or matter is proceeding in a district registry, the district registrar "may" exercise all such authority and jurisdiction in respect thereof as may be exercised by a judge at chambers, except such as by the rules a master (or chief clerk) is precluded from exercising. Order XIII., r. 10,

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otherwise direct. Where final judgment is entered in the district registry, costs shall be taxed in such registry, unless the Court or a judge shall otherwise order."

Rule 5: "Where a cause or matter is proceeding in a district registry, all proceedings relating to the following matters, namely, (*a*) leave to enter judgments under Order XVI., rr. 50 and 51; (*b*) leave to issue or renew writs of execution; (*c*) examination of judgment debtors for garnishee purposes or under Order XLII., r. 32; (*d*) garnishee orders; (*e*) charging orders nisi, shall, unless the Court or a judge shall otherwise order, be taken in the district registry."

Rule 5 (*a*) (Rules of Supreme Court, August, 1894, r. 2): "At the end of Order XXXV., r. 5, add, (*f*) interpleader orders."

Rule 6: "Where a cause or matter is proceeding in a district registry, the district registrar may exercise all such authority and jurisdiction in respect thereof as may be exercised by a judge at chambers, except such as by these rules a master (or chief clerk) is precluded from exercising."

and Order XXVII., r. 15, empower the Court or a judge to set aside or vary a judgment entered in default of appearance; and by Order LIV., r. 12, a master may exercise the jurisdiction of the judge in this respect. There is nothing in Order XXXV. to shew that the registrar's jurisdiction ceases when final judgment has been signed. The true construction of Order XXXV. is that the rules preceding rule 6 provide that certain proceedings in actions in the district registry must be taken in the registry, but rule 6 gives the registrar in respect of such actions all the jurisdiction that a master has in actions proceeding in the High Court. Rule 6 is in general terms, and there is nothing to confine the jurisdiction thereby given to the proceedings mentioned in the five preceding rules. It is submitted that the grounds of the decision in *Hood & Sons* v. *Yates* (1), which will be relied upon by the plaintiff, are erroneous. It is not necessary, however, to contend that the actual judgment in that case was wrong, for, as was pointed out in the argument, the question there was whether the master had power to make an interpleader order, and it was not really necessary to decide that the registrar had not jurisdiction, but only that the master had jurisdiction.

*A. H. Carrington*, for the plaintiff. Order XXXV., r. 6, only gives to the registrar the jurisdiction of a master for the purposes of the proceedings referred to in the preceding rules of the order. Under rule 1 the jurisdiction of the registrar ends with final judgment. The only matters in which the registrar has jurisdiction after final judgment are those expressly mentioned in rules 4 and 5 of Order XXXV. The ratio decidendi in *Hood & Sons* v. *Yates* (1) is directly opposed to the defendant's contention. If that contention is correct, there was no need for the making of Order XXXV., r. 5 (*a*), which was made in August, 1894, in consequence of the decision in *Hood & Sons* v. *Yates* (1), and which gave the district registrar jurisdiction to make an interpleader order in relation to actions in the district registry. If rule 6 makes a registrar's jurisdiction coextensive with that of a master, rule 5 would also be unnecessary.

*Montague Lush*, in reply.

(1) [1894] 1 Q. B. 240.

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A. L. SMITH L.J. The result at which we have arrived is that the appeal must be allowed. The contention of the plaintiff is that the district registrar had no jurisdiction to set aside the judgment as originally entered on the ground that under the rules to which I will presently refer the jurisdiction of a district registrar ceases upon the entry of final judgment except in respect of certain matters specifically provided for by the rules. By Order XXXV., r. 1, it is provided that, where a cause or matter is proceeding in a district registry, all proceedings, except where by the rules it is otherwise provided, or the Court or a judge shall otherwise order, "shall" be taken in the district registry down to and including the entry of final judgment. I need not refer to the subsequent rules 2, 4, and 5 of the order further than by pointing out that they, like rule 1, are all imperative, and provide that the proceedings therein referred to "shall" be taken in the district registry unless the Court or a judge shall otherwise order. They therefore give exclusive jurisdiction to the district registrar in these matters, unless the Court or a judge otherwise directs. But when we come to rule 6 we find that it provides that, where a cause or matter is proceeding in a district registry, the district registrar "may" exercise all such authority and jurisdiction in respect thereof as may be exercised by a judge at chambers, except such as by the rules a master (or chief clerk) is precluded from exercising. In my judgment the true reading of that rule is that it gives to the district registrar in respect of actions in the district registry jurisdiction concurrent with that of a master under the rules, except in cases where exclusive jurisdiction has previously been given to the registrar. It is true that a Divisional Court appear to have said, in *Hood & Sons* v. *Yates* (1), that rule 6 only gives the registrar jurisdiction in respect of the matters referred to in the preceding rules of the order; but their observations went further than was necessary for the purposes of that case, for all that it was really necessary to decide in that case was that the master had jurisdiction. Therefore, without overruling the actual decision in that case, we may decide that the registrar had jurisdiction to set aside the judgment in this

(1) [1894] 1 Q. B. 240.

case. The object which the Rule Committee had in view in framing rule 5 (*a*) is plain enough. There having been a judgment deciding that a master had jurisdiction to make interpleader orders in respect of executions on judgments in actions in the district registry, it was thought desirable to give exclusive jurisdiction to the district registrars in respect of interpleader in such actions, unless the Court or a judge should otherwise order. For these reasons I think the appeal should be allowed.

RIGBY L.J. I am of the same opinion. I concur in the view that the rules of Order XXXV. which precede rule 6 are peremptory to the effect that in actions in a district registry the proceedings referred to in those rules "shall" be taken in the district registry, unless the Court or a judge otherwise orders. It seems to me equally plain that rule 6 does not make it compulsory upon parties to take other proceedings in such actions in the district registry, but makes it permissive to do so. It appears reasonable that, in a proceeding to set aside a judgment signed in an action in a district registry, where there has been an error such as occurred here as to the amount for which the judgment has been signed, the officer who has had full control of the proceedings down to the time of its being signed should have jurisdiction to rectify it; and I do not find anything in the rules to prevent the Court from coming to the conclusion that he has such jurisdiction. I am not sure, though it is not necessary to decide the point, that we could treat as a final judgment for this purpose a judgment which according to the justice of the case ought not to be final or to stand, a judgment which has an inherent fault in it like that in the present case.

COLLINS L.J. concurred.

*Appeal allowed.*

Solicitors for plaintiff: *Sims & Syms.*

Solicitors for defendant: *Shaw, Tremellen & Kirkman, for Whitehead, Staleybridge.*

E. L.

C. A.
1897
*Nov.* 22.

[IN THE COURT OF APPEAL.]

## TURNER *v.* STALLIBRASS AND OTHERS.

*Practice—Costs—Action founded on Tort—Contract of Agistment—Bailment—Negligence—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

An action founded on the common law liability of a bailee is an action founded on tort within the meaning of s. 116 of the County Courts Act, 1888.

APPEAL from an order of a judge at chambers as aftermentioned.

The action was brought to recover damages in respect of injury to a horse belonging to the plaintiff. The statement of claim alleged that the plaintiff delivered to the defendants a horse, the property of the plaintiff, to be agisted, kept, and taken care of by the defendants in consideration of a payment of one shilling a day by the plaintiff to the defendants; and the defendants promised the plaintiff in consideration of the premises to safely keep, agist, and take care of the said horse; and that in breach of the said contract the defendants did not safely keep, agist, and take care of the said horse, but negligently erected in the field in which the said horse was turned out a low wire fence, and negligently permitted the grass to grow so as to hide the said wire fence, whereby the plaintiff's horse was injured. Alternatively, the statement of claim alleged that the defendants in breach of their contract negligently allowed the said horse to be kept and to remain in a field containing the said wire fence so concealed as aforesaid, whereby the plaintiff's horse was injured.

It appeared at the trial that the plaintiff had delivered the horse in question to the defendants for agistment, and that the horse had been placed in a field where there was a barbed wire fence concealed by long grass, through which injury had been occasioned to the horse. The learned judge left it to the jury to say whether it was negligent on the part of the defendants to put the horse in a field where there was such a fence

as that in question. The jury found for the plaintiff for 30*l.* damages. The master held on taxation that the plaintiff was entitled to the costs of the action on the High Court scale; but on appeal the judge reversed his decision, holding that the action was one founded on contract within the meaning of s. 116 of the County Courts Act, 1888, and therefore the plaintiff was only entitled to costs on the county court scale.

*T. Willes Chitty*, for the plaintiff. This was an action founded on tort within the meaning of s. 116 of the County Courts Act, 1888, and the plaintiff, having recovered therein more than 20*l.*, was entitled to costs on the High Court scale. The test laid down in *Taylor* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1) and *Kelly* v. *Metropolitan Ry. Co.* (2) is whether, in order to support his cause of action, the plaintiff must rely on a contract. The plaintiff in this case, upon proof that he delivered the horse to the defendants to be taken care of, and that the horse was injured through the negligence of the defendants, shewed a good cause of action for a tort, and he was not obliged in order to maintain his action to rely on any contract. It is well settled that for this purpose the substance of the action must be looked at, and not the form of the pleadings: *Bryant* v. *Herbert.* (3)

*Lyttelton*, for the defendants. This was an action founded on contract within the meaning of s. 116 of the County Courts Act, 1888. The action was conducted by the plaintiff's counsel at the trial as being an action founded on a contract to keep the horse safely. Without the contract of agistment no cause of action would have arisen, and the plaintiff could not have launched his case without proving that contract. If proof of a contract is necessary to found the action, then the action is for this purpose one of contract. The cases with regard to injuries occasioned to railway passengers are distinguishable, for there the railway company owed a common law duty not to be negligent to a person who was travelling in their train independently of the contract, and whether he was being carried

(1) [1895] 1 Q. B. 135. (2) [1895] 1 Q. B. 944.
(3) (1878) 3 C. P. D. 389.

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under a contract or not. Here the only duty in respect of the plaintiff's horse arose from the contract of agistment. [He cited *Boorman* v. *Brown* (1) and *Legge* v. *Tucker*. (2)]

*T. Willes Chitty*, in reply.

A. L. SMITH L.J. I am of opinion that this is an action founded on tort within the meaning of s. 116 of the County Courts Act, 1888. The rule of law on the subject, as I understand it, is that, if in order to make out a cause of action it is not necessary for the plaintiff to rely on a contract, the action is one founded on tort; but, on the other hand, if, in order successfully to maintain his action, it is necessary for him to rely upon and prove a contract, the action is one founded upon contract. The question is under which class the present action falls. It was held in *Bryant* v. *Herbert* (3) that for this purpose the form of the action as stated in the pleadings is immaterial. In my opinion, the way in which the plaintiff's counsel opened his case at the trial is equally immaterial; and, if it be material to consider how the judge directed the jury, in this case it is clear that he directed them substantially as if the action were one of tort, not of contract; for he asked them whether it was an unreasonable or negligent thing to have such a fence as this in a field in which cattle were kept. The question is whether upon the facts of the case this was an action which could be maintained without relying on the contract of agistment. I think that the plaintiff shewed a good cause of action by proving a bailment on which a duty arose at common law on the part of the defendants not to be negligent in respect of the plaintiff's horse, independently of any contract, and a breach of that duty. On that short ground I think this was an action founded on tort within the meaning of the enactment of the County Courts Act, 1888, as to costs. For these reasons I think the appeal must be allowed.

RIGBY L.J. I am of the same opinion. The enactment on which this case depends divides actions into two classes for

(1) (1842) 3 Q. B. 511. (2) (1856) 1 H. & N. 500.
(3) 3 C. P. D. 389.

the purpose of discriminating between them with regard to costs, namely, actions founded on contract and actions founded on tort. The question whether an action falls within one class or the other depends on the facts of the case, not on the form in which the action is brought. It has long ago been settled that the form of the pleadings is for this purpose immaterial. The rule is that, if the plaintiff, in order to shew a cause of action, must rely on a contract, the action is one founded on contract; otherwise it is one of tort. I think that in this case the plaintiff was not obliged to rely on a contract, and therefore the action must be treated as one founded on tort.

COLLINS L.J. I am of the same opinion. I think some confusion may possibly arise from the expression of the rule on this subject as being that the test is whether the plaintiff is obliged, in order to maintain his action, to rely on a contract. The relation of bailor and bailee must arise out of some agreement of the minds of the parties to it; but that agreement of minds is not the contract contemplated by that mode of expressing the rule to which I refer. Such an agreement of minds is presupposed in the case of any relation which brings about the common law liability of a bailee to his bailor. Where such a relation is established, the result of the cases appears to be that, if the plaintiff can maintain his action by shewing the breach of a duty arising at common law out of that relation, he is not obliged to rely on a contract within the meaning of the rule; but, if his cause of action is that the defendant ought to have done something, or taken some precaution, which would not be embraced by the common law liability arising out of the relation of bailor and bailee, then he is obliged to rely on a contract within the meaning of the rule. A distinction has been drawn between acts of misfeasance and non-feasance which has given rise to some difficulty; but it seems to me that, whether the matter complained of is one of misfeasance or non-feasance, the question really is whether it is embraced within the ambit of the common law liability arising out of the relation between

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Collins L.J.

bailor and bailee. If it is, then the plaintiff is not driven to rely on a contract within the meaning of the rule on the subject of costs. But, if it is not, then the plaintiff must rely on a contract in order to shew a cause of action, and the action is therefore one founded on contract. In the present case it is quite clear that the duty upon a breach of which the action was founded was one which arose at common law simply out of the relation of bailor and bailee, and therefore the plaintiff was not driven to rely on the contract. I quite agree that this question does not depend on the form of the pleadings; but the case of *Corbett* v. *Packington* (1), which was decided at a time when it was essential that the pleader should accurately state the cause of action, illustrates what I have said with regard to the distinction between the liability arising at common law out of the relation of bailor and bailee, and any further liability arising on the terms of the contract of bailment. It was held in that case that a count alleging that the plaintiff had delivered certain boars and pigs to the defendant to be taken care of for reward, and that the defendant had in consideration thereof agreed with the plaintiff to take care of them, and redeliver the same to the plaintiff on request, was a count in assumpsit, and could not therefore be joined with counts in case, because the alleged obligation to redeliver the pigs went beyond the common law duty of the defendant as bailee, and could only arise out of the contract.

*Appeal allowed.*

Solicitor for plaintiff: *Alfred Slater.*

Solicitors for defendants: *King & Burrell.*

(1) (1827) 6 B. & C. 268.

E. L.

[COURT FOR CONSIDERATION OF CROWN CASES RESERVED.]

1897
*Aug.* 7;
*Nov.* 27.

## THE QUEEN *v.* LYNCH AND JONES.

*Criminal Law—Intimidation—Seamen—Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *ss.* 7, 16.

Sect. 16 of the Conspiracy and Protection of Property Act, 1875, which enacts that the Act shall not apply to seamen, means seamen as defined by the Merchant Shipping Acts—that is to say, persons employed or engaged on board ship. The section, therefore, does not exempt from the punishments prescribed by the Act persons whose calling or occupation is the sea, but who are not actually so employed or engaged.

CASE reserved by Ridley J. for the consideration of the Court for Crown Cases Reserved.

The prisoners were tried on an indictment preferred under s. 7 of the Conspiracy and Protection of Property Act, 1875, charging them with having, on June 3, 1897, "with a view to compel one William Eten to abstain from doing that which he had a legal right to do—that is to say, from performing a contract which he had entered into with the owners of the steamship *Lesreaulx* to serve as a seaman on board the said ship—used violence to and intimidated the said William Eten, and watched and beset the place where the said William Eten then was, and followed with others the said William Eten in a disorderly manner."

The indictment was proved, but objection was taken on the ground that the prisoners were seamen, and that by s. 16 of the Act it was provided that nothing in the Act should apply to seamen or to apprentices to the sea service.

There was evidence that the prisoners followed the sea as a calling, each of them having been engaged as fireman on board steamships, but on the day in question they were not engaged or employed as firemen or seamen on board ship. It was not shewn when either of them had been last so employed or engaged, but they followed the sea as an occupation.

The learned judge directed the jury that the prisoners were

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not within the exception, and they were convicted and sentenced accordingly.

*J. D. Crawford*, for the prisoners. The words in s. 16 are perfectly general, and they ought to have a liberal construction. The Conspiracy and Protection of Property Act, 1875, was not intended to apply to men whose calling was the sea. It can make no difference whether at the moment the offence is committed such a man happens to be on shore. If the word "seamen" is to be given the meaning of "persons employed on board ship," it would include many persons who are not sailors, such as the stewards and the ship's doctor. [He cited *Kennedy* v. *Cowie*. (1)]

*B. Francis Williams, Q.C.* (*Arthur Lewis* with him), for the Crown. The statutory definition of "seaman" given in the Merchant Shipping Act includes every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship. That is the sense in which the Legislature must be taken to have intended to have used the word in s. 16. The Merchant Shipping Act provides a code for dealing with seamen while on board ship, and there is no need for recourse to the provisions of the Conspiracy and Protection of Property Act, 1875, in regard to such persons.

*Crawford* replied.

*Cur. adv. vult.*

Nov. 27. The judgment of the Court (Lord Russell of Killowen C.J., Pollock B., Hawkins, Lawrance, and Collins JJ.) was read by

LORD RUSSELL of KILLOWEN C.J. The prisoners were indicted and convicted for an offence under the provisions of the Conspiracy and Protection of Property Act, 1875, s. 7, for having, with a view to compel one William Eten to abstain from doing that which he had a legal right to do—that is to say, from performing a contract which he had entered into with the owners of the steamship *Lesraulx* to serve as a seaman on board the said ship—intimidated the said William Eten,

(1) [1891] 1 Q. B. 771.

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and watched and beset the place where he then was, and followed him with others in a disorderly manner.

The facts, which were proved and not disputed by the prisoners' counsel, were as follows. William Eten, together with Henry Chandler and James Owen, signed articles on board the steamship *Lesreaulx*, then lying under a coaling tip in Penarth Dock. Articles were signed on board the vessel instead of at the shipping office as usual, because the owners of the *Lesreaulx* were paying a lower rate of wages than that allowed by the Seamen and Firemen's Union, and in consequence of apprehended violence from the members of the union. On coming ashore the prisoners, together with a number of other persons who had been waiting on the dock side, surrounded them, and it was proved that they were intimidated and assaulted by the prisoners, who followed them in company with the others for a distance of some 300 yards. There was evidence that the prisoners followed the sea as a calling, each of them having been engaged as fireman on board steamships, but on the day in question they were not engaged or employed as firemen or seamen on board ship. It was not shewn when either of them had been last so employed or engaged, but they followed the sea as an occupation.

At the conclusion of the case for the prosecution, the counsel for the prisoners submitted that there was no evidence to go to the jury in support of the indictment on the ground that, by s. 16 of the Conspiracy and Protection of Property Act, 1875, it was provided that the Act should not apply to seamen or apprentices to the sea service, and that, therefore, the prisoners could not be convicted. For the prosecution it was contended that the term "seamen" in the Conspiracy and Protection of Property Act, 1875, applied only to seamen actually engaged or employed on board ship within the definition in the Merchant Shipping Acts, 1854 and 1894, namely, 17 & 18 Vict. c. 104, s. 2, and 57 & 58 Vict. c. 60, s. 742.

The learned judge, Ridley J., directed the jury that for the purposes of the case the defendants were not within the exception contained in s. 16, and they were convicted and sentenced accordingly.

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The sole question, therefore, for the opinion of the Court is, What is the proper construction to be put upon the word "seaman," as used in s. 16 of the Act of 1875?

If there were no reason to the contrary, "seaman" might well be construed in its largest sense as meaning a seafaring man or person whose ordinary occupation is that of a seaman, just as a person whose usual avocation is that of a carpenter is so called although he may be out of employ at the particular time. In construing an Act of Parliament, however, it is necessary to inquire into the intention of the Legislature, giving just effect to the language employed, having regard to the object in view, and taking into account other legislation bearing on the question. The question at once arises, Why are seamen excepted from the provisions of the Act and not a carpenter or any other workman or artificer? If "seaman" means "seafaring man," it would be difficult to suggest any reason for so large an exception; whereas if it is taken in the limited sense of the definition in the Merchant Shipping Acts, a reason for such exception might possibly be found in the special legislation of those Acts applicable to the limited class of seamen as therein defined. If, for instance, the Merchant Shipping Act, 1854, contained a series of clauses similar in principle to those which are found in the Conspiracy and Protection of Property Act, 1875, but by their language specially adapted to the case of sailors in actual employment, the distinction would be obvious, and the argument in favour of the prosecution would be irresistible. And although the provisions of the Merchant Shipping Act, 1854, as to sailors in actual employment are not similar to those which are contained in the Conspiracy and Protection of Property Act, 1875, the Merchant Shipping Act, 1854, does contain provisions which have an important bearing upon the determination of the present case.

By the interpretation clause of the Merchant Shipping Act, 1854, s. 2, it is enacted that seaman shall include every person "(except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship."

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By s. 243 (1), which deals with offences of seamen and their punishment, sub-s. 4, it is provided thus: "For wilful disobedience to any lawful command a seaman shall be liable to imprisonment for any period not exceeding four weeks, with or without hard labour, and also at the discretion of the Court to forfeit out of his wages a sum not exceeding two days' pay."

By s. 257 it is provided that "Every person who by any means whatever persuades or attempts to persuade any seaman or apprentice to neglect or refuse to join or to proceed to sea in or to desert from his ship, or otherwise to absent himself from his duty, shall for each such offence in respect of each such seaman or apprentice incur a penalty not exceeding 10*l*." These provisions create a wide distinction between a seaman actually employed or engaged under the Merchant Shipping Act and a mere seafaring man not so actually employed or engaged, and the status of the former is thereby rendered very different from that of the latter. With reference to the offence dealt with by the Conspiracy and Protection of Property Act, 1875, the captain of a vessel possesses ample power to deal with a seaman under his command. He may require him as a lawful command, under s. 243, sub-s. 4, to abstain from intimidation; or if a seaman persuades or attempts to persuade another seaman to neglect or refuse to join or to proceed to sea in or to desert from his ship, or otherwise to absent himself from his duty, he may summon him for the penalty.

Under these circumstances the Legislature may well have considered the mischief dealt with by the Conspiracy and Protection of Property Act, 1875, already sufficiently provided against, and have declined to add a cumulative remedy.

It was suggested in argument that a difficulty might arise in determining whether a seaman was "employed or engaged," and also whether, as the Act adds the words "on board any ship," a seaman would be liable if he committed the alleged illegal act ashore. These objections have no real foundation, as the employment or engagement must be decided as a fact in

(1) The Merchant Shipping Act, 1854, has been repealed, but these sections have been re-enacted by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60): see ss. 225, 236.

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each case, and a seaman may well be held to be employed or engaged on board a ship although at the particular point of time he may have been sent ashore on duties connected with the ship, such as obtaining stores or provisions, or taking a letter to the ship's agent.

What is found in the case as to the prisoners is that "there was evidence that they followed the sea as a calling, each of them having been engaged or employed as fireman or seaman on board ship. It was not shewn when either of them had been last so employed or engaged, but they followed the sea as an occupation." It is consistent with this that they had been out of employment for months, and they appear to have had no immediate or certain prospect of a future engagement.

It would be strange if the Legislature intended to exclude such persons from the legislation of 1875 as well as from that of the Merchant Shipping Acts.

On the whole, therefore, it appears that at the date of the passing of the Act of 1875 the Legislature had already in an earlier statute defined what it meant by seamen, that the explanation of their exclusion from the later Act must be sought in the fact that they were already the subject of special enactments giving another remedy for some of the matters included in the later statute, and that no ground of reason or common sense can be found for excluding from the operation of the Act in question the whole class of seafaring men not actually engaged in sea service. Under the circumstances, we think the view taken by the learned judge at the trial was correct, and the conviction must be affirmed.

*Conviction affirmed.*

Solicitors for prosecution: *David & Evans, Cardiff.*
Solicitors for defence: *Pattinson & Brewer.*

A. P. P. K.

## BAGLEY *v.* BUTCHER AND MERRIMAN.

1897
*Nov.* 20.

*Parliament—County Vote—Description of Nature of Qualification—"Dwelling-house joint"—Reform Act*, 1832 (2 & 3 *Will.* 4, *c.* 45), *ss.* 20, 27—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *ss.* 3, 27—*Representation of the People Act*, 1884 (48 & 49 *Vict. c.* 3), *ss.* 2, 5, 7.

The qualification of two persons on the list of voters for a county was described as "dwelling-house joint." Objection was taken on the ground that such a qualification was expressly forbidden by law. The dwelling-house was of more than sufficient value to give 10*l.* a year annual value to each joint occupier:—

*Held*, that the claim, although bad as a claim for the household franchise, was good as a claim for occupation franchise.

CASE stated by a revising barrister.

The following names appeared on the occupiers' lists for the parishes of Preshute and Pewsey, in the county of Wilts.

| Name of Claimant. | Place of Abode. | Nature of Qualification. | Description of Qualifying Property. |
|---|---|---|---|
| 1. Hussey, Christopher Pearce. | Clatford . . | Dwelling-house joint | Clatford House. |
| 2. Hussey, John Compton | ,, | ,, | ,, |
| 3. Hussey, William James | ,, | ,, | ,, |
| 4. Taylor, Alexander . . | Manton Down | ,, | Manton House. |
| 5. Taylor, Thomas . . | ,, | ,, | ,, |
| 6. Dixon, Charles Arthur | Pewsey . . | ,, | Southcote. |
| 7. Dixon, Henry Partridge | ,, | ,, | ,, |

All these names had been duly objected to, the wording of the objection being "that the nature of your qualification is expressly forbidden by law."

No claim for amendment was made, nor was there any statutory declaration, nor was the revising barrister asked to make any amendment.

In each instance the dwelling-house was used only as a residence, and was of more than sufficient value to give 10*l.* a year annual value to each joint occupier.

The revising barrister held the objection good and expunged the names.

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*William Graham*, for the appellants. The revising barrister was wrong. The question is really decided by *Townshend* v. *Overseers of St. Marylebone* (1) and *Druitt* v. *Gossling* (2), in both of which it was held that a claim in respect of joint occupation of a dwelling-house, although bad as a claim for the household franchise, was good as a claim for a franchise under the Reform Act. Sect. 27 of the Reform Act, 1832, gave a vote in boroughs to all occupiers of houses, &c., of the clear yearly value of 10*l.* Then, by the Representation of the People Act, 1867, s. 3, the 10*l.* limit is taken away, and every occupier of a house, &c., is given a vote for the borough; but it is provided that no man shall be entitled under that section to be registered as a voter by reason of his being a joint occupier of any dwelling-house. Sect. 6 gives a county vote to the occupier of lands or tenements of the clear yearly value of 12*l.* By the Representation of the People Act, 1884, s. 5, the yearly value of 10*l.* is substituted for the value of 12*l.* By s. 27 of the Act of 1867 the county vote is given to joint occupiers if the aggregate rateable value is sufficient if divided among the several occupiers to give each of them a vote. The appellants' claim, therefore, is under this section, and not under s. 3.

*Lewis Thomas*, for the respondent. The revising barrister was right. The appellants' claim was under s. 3 in respect of a qualification which the law does not recognise, namely, "dwelling-house joint." By s. 20 of the Reform Act the county vote is given to occupiers of lands and tenements of a clear yearly value of 50*l.* By the Act of 1867, s. 6, the value is reduced to 12*l.*, but that is the only alteration. That Act, however, by s. 3 created a new franchise in respect of boroughs only—the 10*l.* householder; but it specially provided against a qualification for this franchise by joint occupation. By s. 2 of the Act of 1884 this newly-created franchise was extended from boroughs to counties, but by s. 7 express reference is made to s. 3 of the Act of 1867; therefore the provision against qualification by joint occupation still applies. There can, therefore, be no claim as joint occupier of a dwelling-house, although there may be a claim in respect of joint occu-

(1) (1871) L. R. 7 C. P. 143. (2) (1888) 58 L. J. (Q.B.) 109.

pation of lands and tenements where the value is sufficient to give each occupier the 10*l.* qualification. This is recognised by the Registration Order, 1895, Sched. II., s. 7 (ii.), which is made under the authority of the Local Government Act, 1888, s. 76, sub-s. 7 : see Rogers on Elections, 16th ed. p. 642.

*Townshend* v. *Overseers of St. Marylebone* (1) can be distinguished, as the claim there was not in respect of "dwelling-house joint," but only in respect of "dwelling-house." So, in *Druitt* v. *Gossling* (2), the claim was in respect of "house and land joint," and did not therefore purport to be a claim for the household franchise at all. If *Townshend* v. *Overseers of St. Marylebone* (1) cannot be distinguished it is bad law, and should not be followed.

*William Graham*, in reply. In *Bradley* v. *Baylis* (3) Brett L.J., who dissented from the decision in *Townshend* v. *Overseers of St. Marylebone* (1) treats that case as deciding that if a man claimed for a dwelling-house, and it was found that his occupation would not give him a vote under the Act of 1867, he might under that claim support his vote by shewing a qualification under the Reform Act; and he continues that, although he is still of the same opinion that he then was, he should not think it right to propose in the Court of Appeal to overrule that decision after it had lasted so long. (4)

LORD RUSSELL of KILLOWEN C.J. In this case we have to deal with the point presented to us in the precise way in which it is presented to us. It is not open to us to consider objections which might have been taken, but which were not taken in fact. Nevertheless one cannot look at all the circumstances without seeing that the claim of the first three persons to a vote by joint occupation could not probably have been sustained, and that in the other cases the names are probably those of father and son residing together, and a question might arise whether that was a joint occupation within the meaning of the Act. But these are mere speculations in which we are not entitled to indulge. The entry on the list of the nature of

(1) L. R. 7 C. P. 143.
(2) 58 L. J. (Q.B.) 109.
(3) (1881) 8 Q. B. D. 195.
(4) 8 Q. B. D. 195, at p. 231.

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the qualification is in each case stated to be "dwelling-house joint." The question, therefore, is whether we are bound to treat the claim in each instance as a claim for household franchise, or whether it may not properly be treated as a claim for the occupation franchise. It seems to me that there is an authority which settles the matter. The case of *Townshend* v. *Overseers of St. Marylebone* (1), and the judgment of the majority of judges in that case, seem to me to cover this case. That decision is also supported by the decision in *Druitt* v. *Gossling* (2), and by the remarks of the late Master of the Rolls (then Brett L.J.) in *Bradley* v. *Baylis*. (3) It is clear from his language in that case that he regarded the decision in *Townshend* v. *Overseers of St. Marylebone* (1) as bearing the interpretation which we are prepared to put upon it, namely, that where the qualification may, in fact, be supported, the mere circumstance that the word "dwelling-house" is used whether with or without the word "joint" will not render bad a claim which, although admittedly bad for the household franchise, can be substantiated as a claim for a franchise other than the household franchise.

In *Ford* v. *Boon* (4), a case to which my attention has been directed by Darling J., the late Master of the Rolls (then Brett J.) says (5), as to the case of *Townshend* v. *Overseers of St. Marylebone* (1): "There the claimant, whose qualification was as joint occupier of a house of the value of more than 20*l.* a year, described his qualification as 'dwelling-house.' Under that he might clearly have shewn a qualification as an inhabitant occupier under the Representation of the People Act, 1867; and the decision of the Court, as I understand it, was, not that 'dwelling-house' did not sufficiently describe the qualification under that Act, but, assuming that it did, it also described a qualification under the old Reform Act, and might therefore be applied to that qualification." Considering, therefore, that a very slight variation in the description would have been sufficient to make the claim a good one, I think that the

(1) L. R. 7 C. P. 143.
(2) 58 L. J. (Q.B.) 109.
(3) 8 Q. B. D. 195.
(4) (1871) L. R. 7 C. P. 150.
(5) L. R. 7 C. P. 150, at p. 157.

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objection is not a matter of substance; and, as I have said, the case seems to me to be covered by authority. I ought to add, with regard to the case of *Townshend* v. *Overseers of St. Marylebone* (1), that even if we did not agree with it, it is a case of such authority and so well established that we could not dissent from it; but as a matter of fact we do agree with that decision.

In my opinion, therefore, the revising barrister was wrong, and this appeal must be allowed.

WRIGHT and DARLING JJ. concurred.

*Appeal allowed.*

Solicitors for appellants: *Ayrton & Biscoe.*

Solicitors for respondent: *Russell Cooke & Co.*

A. P. P. K.

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## SMITH *v.* GALLOWAY.

1897

*Nov.* 6.

*Friendly Society—Alteration of Rules, Effect of.*

Sect. 27 of the Friendly Societies Act, 1855 (18 & 19 Vict. c. 63), enacted that friendly societies might alter, amend, or rescind their rules or make new rules.

A rule of a friendly society made at a time when that Act was in force provided that "No new rule shall be made, nor any of the rules herein contained or hereafter to be made shall be amended, altered, or rescinded, unless with the consent of a majority of the members present at a general meeting":—

*Held*, that that rule of itself conferred an independent power of altering the rules of the society, which power survived notwithstanding the repeal of the Act.

A person became a member of a friendly society at a time when the rules of the society contained a general provision that the rules might be altered. After he had become entitled under the rules to a benefit from the funds of the society in the nature of a superannuation allowance, and whilst he was in actual receipt of it, the rules of the society were so altered as to have the effect of depriving him of that benefit in case of a breach by him of the altered rules. To such alteration of the rules he did not assent except in so far as the fact of joining the society which had a general power of alteration constituted an assent:—

*Held*, that he was bound by the alteration.

CASE stated by arbitrators under s. 19 of the Arbitration Act, 1889.

(1) L. R. 7 C. P. 143.

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The Hearts of Oak Benefit Society is a friendly society which was established in the year 1842 under the Acts then in force relating to friendly societies, and the rules of the said society were duly registered and certified under the said Acts on July 6, 1842.

No provision was made in the said rules for the alteration of the same, but under the powers conferred by s. 27 of the Friendly Societies Act, 1855 (18 & 19 Vict. c. 63), the said rules were altered in 1866, and such alterations were duly registered and certified on April 6, 1866, by the registrar of friendly societies.

Amongst the alterations so made was the introduction of a rule in the words following:—

"Alteration of Rules."

"Rule 50. That no new rule shall be made, nor any of the rules herein contained or hereafter to be made shall be amended, altered, or rescinded, unless with the consent of a majority of the members present at a general meeting of the society specially called for the purpose."

The Friendly Societies Act, 1855, was repealed by the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60).

The above-mentioned rule 50 has never been rescinded, but subsequently to the passing of the Act of 1875 it was amended as follows:—

"Alteration of Rules."

"Rule 53. No new rule shall be made, nor any of the rules herein contained or hereafter to be made shall be amended, altered, or rescinded, unless with the consent of three-fourths of the delegates present at a meeting specially called for the purpose."

This rule was duly registered under the Act of 1875.

In June, 1869, Walter Smith applied for admission to the society, and he was in pursuance of such application admitted a member of the society, and was then supplied by the secretary with a copy of the rules of the society as altered in the year 1866 aforesaid.

In or about May, 1890, Walter Smith declared on the sick fund of the society, and he received sick allowance under the

rules for the time being in force until September 2, 1891, when he was in accordance with such rules placed on the list for reduced allowance, in the rules termed the "superannuated list," and he received such reduced allowance until he was excluded from the society as hereinafter mentioned.

By the said rules any member of the society on the sick fund was subject to conditions, for breach of which he was liable to be excluded from the society, but such conditions did not apply to members on the superannuated list.

In 1896 the rules of the society were altered with the consent of three-fourths of the delegates present at a meeting specially called for the purpose, and such alterations were duly registered on February 4, 1896. Such alterations purported to make members of the society on the superannuated list under the age of sixty years subject to the conditions applicable to members on the sick fund, and liable equally with such last-mentioned members to be excluded from the society for breach of the same.

In January, 1897, Walter Smith, who was then under the age of sixty years, was under the rules as so altered excluded from the society for breaches of one of the said conditions, namely, for being from home on three or more occasions after seven o'clock in the evening, i.e., after the hour allowed by the rules applicable to members on the sick fund. At the time of such breaches Walter Smith had notice of the said alterations, and well knew that by the terms of the altered rules, if they applied to him, he was subject to the said conditions and liable to be excluded from the society for such breaches.

In consequence of such exclusion a dispute arose between the said Walter Smith and the society, and such dispute was in accordance with the rules of the society submitted to arbitration. In the course of the reference Walter Smith admitted the breaches of the said condition for which he had been excluded from the society, but contended that the society had no power to alter their rules after the repeal of the Friendly Societies Act, 1855, and that even if they had he was not bound by the alterations made in the rules in February, 1896, and was therefore not liable to be excluded from the society

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for the said breaches. On the application of T. W. Galloway, the secretary for the society, the arbitrators stated this case.

The questions of law for the opinion of the Court were:—

1. Whether the society had power after the repeal of the Friendly Societies Act, 1855, to alter their rules.

2. Whether, if so, the said Walter Smith was bound by the alterations registered on February 4, 1896, and subject to the conditions thereby made applicable to members of the society on the superannuated list.

*A. W. Sells*, for the plaintiff. The society had no power in 1896 to alter its rules at all. The original constitution of the society gave no such power. And although s. 27 (1) of the Act of 1855 did expressly give such a power, that power was taken away when the Act was repealed by the Act of 1875. This latter Act did not expressly give any power of alteration, and it was held in *Souter* v. *Davies* (2) that neither did it impliedly give any such power. (3) Nor, again, did the society at the time when it was open to it to do so, that is between 1855 and 1875, make any rule giving itself a power of altering its rules. Rule 50 does not profess to confer any such power: it merely gives directions as to the manner in which the statutory power conferred by s. 27 should be exercised. When that section was repealed rule 50 became otiose—it had nothing to operate upon. The framer of rule 53, which was made after the passing of the Act of 1875, indeed seems to have assumed that that Act conferred a similar power of alteration to that contained in s. 27 of the earlier Act. But his assumption was wrong; and rule 53 is consequently wholly inoperative. It is true that ss. 6 and 13 and Sched. II. of the Act of 1875 contemplate

(1) By the Friendly Societies Act, 1855, s. 27, "It shall be lawful for any friendly society formed and established under any of the Acts hereby repealed to alter amend or rescind the rules by which their society is governed regulated or managed or to make new rules."

(2) (1895) 15 R. 261.

(3) By the Friendly Societies Act, 1875, s. 6, "Every society now subsisting whose rules have been registered enrolled or certified under any Act relating to friendly societies .... shall be deemed to be a society registered under this Act, and its rules shall, so far as the same are not contrary to any express provision of this Act, continue in force until altered or rescinded."

friendly societies having a power of alteration of their rules; but those passages may be satisfied by supposing them to refer to cases of societies which either by their original constitution, or by the introduction of a rule for that purpose between 1855 and 1875, had expressly given themselves such a power.

Secondly, assuming that rule 50 did impliedly give a power of alteration, then, inasmuch as that power was created before the plaintiff joined the society and continued to exist in 1896, it must be conceded that the plaintiff consented that the rules might be altered in 1896 to some extent. But it must not be taken that he consented to an alteration which would have the effect of depriving him of a vested interest, and taking away from him a benefit of which he was already possessed: *Auld* v. *Glasgow Working Men's Building Society* (1); *Smith's Case.* (2)

*Morten*, for the defendant. As to the first point: At the time when the plaintiff joined the society there was a statutory power of altering the rules given by s. 27 of the Act of 1855; and s. 6 of the Act of 1875, although not so clearly expressed, was intended to continue that power. That it was so intended is indicated by s. 13, which provides that amendments of rules shall not be valid until registered, and by Sched. II., by which amongst the "Matters to be provided for by the rules of societies registered under this Act" are included "3. The mode of holding meetings and right of voting, and the manner of making altering or rescinding rules." In *Souter* v. *Davies* (3) Wills J. appears to have held the contrary (4), but his attention was apparently not directed to s. 13. Moreover, in this case rule 50, which was introduced before the repeal of the Act of 1855, confers an independent power of alteration. As to the second point, in *Stooke* v. *Mutual Provident Alliance* (5), where the contract of membership provided that the members should be bound by any rules made from time to time, precisely the same contention was raised—that the power of alteration did not

(1) (1887) 12 App. Cas. 197.

(2) (1875) 1 Ch. D. 481.

(3) 15 R. 261.

(4) Since the decision in *Souter* v. *Davies* the Friendly Societies Act, 1875, has been repealed; but s. 6 of that Act has been re-enacted in (so far as is material to this question) identical terms in s. 101 of the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25).

(5) January 28, 1891. Unreported.

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extend to deprive a member of sick pay to which he was already entitled. But the Divisional Court overruled the contention, and an opinion contra given by Sir Roundell Palmer in 1864, when Attorney-General, was not followed.

*Sells*, in reply.

WRIGHT J. The first point made by the appellant was that because the Act of 1855 had been repealed in 1875 the society had no power to alter their rules in 1896. It was said that unless the alteration complained of was made in pursuance of a power of alteration in existence at the date when the plaintiff joined the society, and upon the basis of which power he might be taken to have contracted, that alteration would be a breach of the society's contract. It was contended that the only power of alteration at that date was that given by s. 27 of the Act of 1855; that rule 50 of the society's rules did not of itself confer any power of alteration, but was merely a limitation upon the statutory power given by s. 27, and that as that section was gone the rule was inoperative. In that I cannot agree. Rule 50 itself impliedly gave a power of alteration; and that power survived notwithstanding the repeal of the particular statute under which the rule was made. No doubt if rule 50 stood alone that would not justify the alteration of the rules made in 1896, and of which the plaintiff complains; for the alteration was made with the consent of three-fourths of the delegates present at a meeting, and not "with the consent of a majority of the members present at a general meeting," as required by rule 50. But under the power contained in rule 50 the society made rule 53, and it was under the authority and in accordance with the terms of this latter rule that the alteration of the rules in 1896 was itself made. Therefore I think it was under a power of alteration in existence at the date when the plaintiff joined the society that the alteration in 1896 was made, and that he cannot be heard to complain of the exercise of a power to which by joining the society he assented. The distinction between the present case and that of *Souter* v. *Davies* (1) is that in the latter case, though there was a

(1) 15 R. 261.

statutory power of alteration in existence at the date when the plaintiff joined in 1852, the society had neglected to keep that power alive by the introduction into their rules of any rule corresponding to rule 50.

Then the second point made by the plaintiff was that if the plaintiff did by joining the society assent to a subsequent alteration of the rules, he did so subject to this limitation, that the alteration should not affect a vested interest, and should not deprive him of any benefit to which he had already become entitled in possession at the time of the alteration made. But I can see no ground for introducing any such limitation into his contract. It is a matter of every-day occurrence for societies such as this to make alterations in rules as to the allowance of sick pay affecting even those members who are already in receipt of it. Where the only contract between the society and the member is the original contract under which he became a member, and that, as is the case here, provides for alterations of the rules, he is bound by any subsequent alteration that may be made within the power of alteration, whatever the extent of that alteration may be. Where indeed there is superadded a secondary contract, as in the case of a building society where a member gives a mortgage to the society, it has been held, as in *Smith's Case* (1), that it was not competent for the society by alteration of the rules without the member's assent to alter the effect of that secondary contract. In the present case the plaintiff did by joining agree to the alteration of his original contract of membership, and there was no such secondary contract.

KENNEDY J. I entirely agree, and for the same reasons.

*Judgment for the defendant.*

Solicitors for plaintiff: *Lucas & Mitchell.*
Solicitors for defendant: *Shaen, Roscoe, Massey & Co.*

(1) 1 Ch. D. 481.

J. F. C.

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*Nov.* 4.

[IN THE COURT OF APPEAL.]

## BARING *v.* COMMISSIONERS OF INLAND REVENUE.

*Revenue—Stamp Duty—Foreign Security issued in United Kingdom—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 82, *sub-s.* 1 (*b*), (i.).

A security is not issued within the meaning of the Stamp Act, 1891, s. 82, sub-s. 1 (*b*), (i.), until it becomes a legally effective instrument.

A railway company in the United States had issued bonds secured by a mortgage of the company's property, many of which were in the hands of holders in England. The interest on the bonds being in arrear, a scheme of reorganisation was set on foot under which the property of the company was to be vested in a new railway company, which was to be formed, and was to issue in exchange for the bonds of the old company new bonds to be secured by a mortgage of the new company's property to a trust company in New York as trustee for the bondholders. A new company was formed in which the property of the old company was vested in pursuance of the scheme. By the terms of a deed of mortgage and trust executed by the new company in pursuance of the scheme the new bonds were, when executed by the new company, to be delivered to the trust company to be certified by it, and only such bonds as bore indorsed upon them the trust company's certificate duly signed were to be secured by the mortgage. Bonds payable to bearer were in pursuance of the scheme executed and delivered by the new company to the trust company in New York, each bond containing a clause which provided that the bond should not be valid for any purpose unless authenticated by the certificate indorsed thereon of the trust company. In the case of the new bonds to be delivered to bondholders of the old company in this country, the certificates indorsed on the new bonds were not signed by the trust company in New York, but the vice-president of the trust company came over to London and signed them there. The bonds were then delivered to the bondholders of the old company in this country :—

*Held*, that the new bonds so issued were marketable securities by or on behalf of a foreign company issued in the United Kingdom within the meaning of the Stamp Act, 1891, s. 82, sub-s. 1 (*b*), (i.).

Appeal from the judgment of a Divisional Court (Wright and Ridley JJ.) upon a case stated by Commissioners of Inland Revenue.

The question raised was whether an unregistered bond, of which the appellant, the Honourable J. Baring, was the holder, whereby the Atchison, Topeka and Santa Fé Railway Company, a corporation organised under the laws of Kansas, in the United

States (hereinafter called the new company), promised to pay to bearer, or, if the bond should be registered as thereinafter provided, to the registered holder thereof, the sum of 1000 dollars with interest thereon at the rate of 4 per cent. per annum until the principal became due, was subject to duty under the Stamp Act, 1891, as being a marketable security by or on behalf of a foreign company made or issued in the United Kingdom within s. 82, sub-s. 1 (*b*), (i.), of that Act. (1)

There was an American company called the Atchison, Topeka and Santa Fé Railroad Company (hereinafter called the old company), that had issued a large number of general mortgage 4 per cent. bonds payable to bearer, which, with other obligations, were secured by a mortgage of the company's property to the Union Trust Company of New York (hereinafter called the trust company) as trustee for the holders of the bonds and other obligations before mentioned. These bonds were held by various holders in America and Europe, many of the latter residing in England.

In the year 1895, the old company being in arrear in payment of interest on their bonds, three committees representing bondholders of the company were formed in New York, London, and Amsterdam respectively, and they appointed a committee called the joint executive committee, to act on behalf of the bondholders. On or about March 14, 1895, that committee issued in the form of a printed circular a proposal for the reorganisation of the company, appended to which was a printed form of agreement purporting to be made between the members of the joint executive committee and such holders of stocks, bonds, and other obligations of the old company as should signify their assent, and become parties thereto by depositing their securities with certain depositaries as in the agreement mentioned. This circular, called "plan and agreement of reorganisation" (hereinafter referred to as "the plan and agreement"), was advertised and was sent to (amongst others) those bondholders of the company who were in England, including the appellant, and they were thereby invited by the joint

(1) The case raised other questions to which it is not necessary for the purposes of this report to refer, as they were not decided.

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executive committee to become parties to the agreement with the said committee, to deposit their bonds thereunder, and, in the event of the scheme being carried out, to take in exchange for the bonds so deposited bonds of the new company to be formed as after mentioned.

By the terms of the agreement the plan which was annexed thereto was constituted a part of the agreement. The plan provided for obtaining a foreclosure of the mortgage given by the old company as before mentioned, for sale under the foreclosure decree and purchase of the property of the old company thereby mortgaged, and for the vesting of the property so acquired in a new company to be formed for that purpose, or in some body of persons on their behalf, for the issue of stock and securities of that new company, part of which was, if and when the plan was fully carried out, to be delivered in an agreed proportion to the nominal amount of their existing holdings to such of the holders of stock and securities in the old company as assented to the plan and agreement in satisfaction therefor. Pending the acquisition by the new company of the mortgaged property, stockholders and bondholders who assented to the agreement were required to deposit their securities with certain firms, who were styled depositaries, upon the terms of receiving in exchange for them an instrument styled "reorganisation certificate of deposit" (hereinafter referred to as "certificate of deposit") to be approved of by the joint executive committee. By making such deposit each depositor became a party to the agreement, and was, when the proper time arrived, to be entitled in exchange for the certificate of deposit to receive securities of the new company of the amount and description specified in the plan in accordance with clause 3 of the agreement. By that clause the new securities to be issued in exchange for the certificates of deposit issued by the depositaries in London and Amsterdam were, when ready for delivery, to be transmitted by the joint executive committee to the said depositaries respectively, to be delivered to the holders of the certificates of deposit upon surrender and cancellation thereof. It was provided by the agreement that it should not be construed to create any trust, liability, or obligation to or in favour of any person or

corporation except the respective committees and depositaries and the holders of the certificates of deposit. The amount and description of new securities which the holders of certificates of deposit were entitled to receive appeared from the plan. It appeared by the plan that in substitution for each 1000 dollars general mortgage 4 per cent. bonds of the old company the holder thereof was to be entitled to receive 75 per cent. of the nominal value thereof in 4 per cent. general mortgage bonds of the new company, and 40 per cent. (the additional 15 per cent. covering arrears of interest) in 4 per cent. adjustment bonds of the new company; and that the total nominal amount of general mortgage bonds of the new company which the holders of the general mortgage bonds of the old company would, if they all deposited their bonds, be collectively entitled to receive under the plan and agreement would be 96,990,582 dollars, and the total nominal amount of adjustment bonds would be 51,728,310 dollars.

Messrs. Baring Brothers & Co., Limited, a firm resident in the City of London, were in the plan and agreement named as the depositaries of bonds for London, and agreed to act as such. A large number of stock and bond holders did deposit their securities under and thereby became parties to the agreement, and the scheme was carried out by the joint executive committee.

A decree for foreclosure was obtained against the old company, and the mortgaged property was sold under it, and was purchased by and conveyed to certain persons as purchasing trustees on behalf of the joint executive committee.

On December 12, 1895, the new company was, at the instance of the joint executive committee and other persons associated with them, incorporated under the law of Kansas in pursuance of the plan and agreement.

On the same day an agreement was entered into between the joint executive committee and the new company whereby, after reciting, as the fact was, that the joint executive committee and their associates organised the new company for the purpose of acquiring and operating the properties acquired under the foreclosure sale, and of procuring the creation and

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issue of the bonds and stocks as set forth in the plan and agreement, and of carrying out the various provisions thereof, the joint executive committee agreed to cause the property so acquired to be sold and transferred to the new company for the following considerations: (A) The execution and delivery by the new company to the trust company, as trustee, of a general mortgage to secure (amongst other things) the execution and delivery to the trust company of the amount of 96,990,500 dollars, par value, of general mortgage bonds of the new company to be issued and delivered as provided in the said general mortgage, such bonds to be delivered to the trust company for account of the joint executive committee jointly, and not severally as a committee: (B) The execution and delivery by the new company to another trustee of a second mortgage to secure the execution and delivery by the new company of 51,728,000 dollars adjustment bonds to be issued and delivered as in that mortgage mentioned: (C) The issue and delivery by the new company upon the order of the joint executive committee of specified amounts of preference and ordinary stock in the new company.

This agreement was carried out by two indentures of even date therewith—namely, an indenture of sale whereby the property acquired under the foreclosure sale was transferred by the purchasers to the new company, and a general mortgage over the property so transferred executed by the new company in favour of the trust company to secure the above-mentioned bonds. The mortgage so executed contained the following provisions among others. Art. 1, s. 1, provided that all bonds to be secured thereby should be signed and the corporate seal of the railway company (i.e., the new company) thereto affixed should be attested by such officers of the railway company as from time to time should be thereunto authorized by resolution of the board of directors of the railway company; that in case the officers who should have signed and sealed any of the said bonds as aforesaid should cease to be such officers of the railway company after delivery of such bonds to the trustee (i.e., the trust company), but before the bonds so signed and sealed should have been actually certified and redelivered by

the trustee, such bonds might nevertheless, upon the request of the railway company, be issued, certified, and delivered as thereinafter provided, as though the persons who signed and sealed such bonds had not ceased to be officers of the railway company; that all such bonds, when executed by the railway company, should be delivered to the trustee (i.e., the trust company) to be certified by it, and the trustee should certify and redeliver the same only as provided in that article; and that only such of the said bonds as should bear thereon indorsed the trustee's certificate duly signed should be secured by that indenture or entitled to any lien or benefit thereunder; and such certificate of the trustee upon any bond executed on behalf of the railway company should be the conclusive and only evidence that the bond so certified had been duly issued under the mortgage deed and was entitled to the benefit of the trust thereby created. Art. 1, s. 2, provided that 96,990,500 dollars of such general mortgage bonds should forthwith be executed by the railway company and delivered to the trustee for certification, and the trustee should certify and deliver the same upon the order of the members of the joint committee or any six of them. It was further provided by the mortgage deed that, until the bonds intended to be issued under and secured by it could be engraved and printed, the new company might execute and the trustee should certify and deliver in lieu of such bonds, and subject to the same provisions, limitations, and conditions, temporary registered bonds as therein specified; and that the temporary bonds so issued should be entitled to the security of the bonds to be issued under the mortgage deed, and that upon surrender of such temporary bonds for exchange the railway company should issue and the trustee should certify and deliver in exchange therefor engraved bonds to the amount of the temporary bonds surrendered upon cancellation of the latter.

The new company, pending the completion of the permanent bonds, executed and delivered to the joint executive committee a temporary general mortgage bond in favour of the trust company for 96,990,500 dollars, and a temporary adjustment mortgage bond for 51,728,000 dollars, being the respective

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totals of the permanent general mortgage bonds and adjustment bonds to be executed and delivered as above mentioned. When delivered by the new company to the joint executive committee those bonds had the certificate of the trust company indorsed thereon duly signed.

By a trust agreement dated January 14, 1896, the joint executive committee assigned, transferred, and delivered these temporary bonds to the trust company upon trusts which, so far as material, were as follows—namely, that they should surrender the temporary bonds in exchange for engraved bonds executed by the railway company (i.e., the new company) issued under the respective mortgages securing the temporary bonds when such engraved bonds should be ready for delivery; and that, when the engraved bonds had been received by them in exchange for the temporary bonds, they should deliver to the respective holders of the certificates of deposit issued for general mortgage bonds of the old company deposited under the plan and agreement engraved general mortgage bonds and adjustment bonds to the following amounts upon surrender and cancellation of the certificates of deposit—namely, for each 1000 dollars of general mortgage bonds of the old company represented by certificates of deposit surrendered 750 dollars, par value, in general mortgage bonds issued under the general mortgage dated December 12, 1895, and 400 dollars, par value, of the adjustment mortgage bonds. It was further provided by the agreement of January 14, 1896, that the new securities to be delivered under the plan and agreement in exchange for the certificates of deposit issued by the depositaries in London and Amsterdam should, when ready for delivery, be transmitted to the depositaries to be delivered to the holders of certificates of deposit upon surrender and cancellation thereof.

Shortly after April, 1896, the new company in fulfilment of their covenant executed in the United States general mortgage bonds (of which the bond in question was one) and adjustment bonds amounting in all to the agreed totals, some of the bonds being of the nominal amount of 1000 dollars, and others of the nominal amount of 500 dollars, and delivered them to the trust company in New York. In each of the general mortgage

bonds it was stated that it was one of a series of similar general mortgage 4 per cent. 100 year gold bonds issued in pursuance of and secured by a mortgage or deed of trust dated December 12, 1895, executed by the railway company to the trust company as trustee, covering the property and franchises of the railway company as therein described, to which mortgage or deed of trust reference was thereby made for a description of the property and franchises mortgaged and the rights of the holders of the said bonds under the same, and the terms and conditions upon which the said bonds were issued; and it was provided that "this bond shall not be valid for any purpose unless authenticated by the certificate hereon indorsed of the trustee under the said mortgage or deed of trust." Each bond had indorsed thereon the following certificate: "Union Trust Company of New York hereby certifies that this is one of the series of general mortgage 4 per cent. 100 year gold bonds described in the within-mentioned mortgage or deed of trust dated December 12, 1895"; but the certificate was unsigned when the bonds were delivered by the new company to the trust company. The trust company thereupon, under the provisions of the trust agreement of January 14, 1896, forwarded to each of the depositaries in Europe a sufficient number of general mortgage and adjustment bonds respectively to enable them to make the exchange against the certificates of deposit issued by them respectively in the ratio above specified. The trust company were to countersign the bonds before forwarding them, but it was found that the premium to be paid for the insurance of the bonds on their transmission to London would be so heavy that it was arranged between the joint executive committee and the trust company that the vice-president of the trust company should proceed to London and countersign them there; and this was accordingly done in the case of all the bonds sent to Messrs. Baring Brothers & Co., including the bond in question, the vice-president, in pursuance of art. 1, s. 1, of the general mortgage, signing each bond by adding the words, "Union Trust Company of New York, trustee, by E. H. Merritt, vice-president." Messrs. Baring Brothers & Co. received the bonds forwarded to them as depositaries as above mentioned

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for the purpose only of exchanging them against certificates of deposit issued by them. Among the bonds so sent to them was the bond in question. It was subsequently delivered by them to the appellant at their office in London in exchange for a certificate of deposit issued by them in pursuance of the scheme of reorganisation.

The Commissioners of Inland Revenue held that the bond was issued in the United Kingdom within the meaning of s. 82, sub-s. 1 (*b*), of the Stamp Act, 1891, and was therefore chargeable with the duty applicable to marketable securities transferable by delivery and bearing date after August 6, 1885, namely, at the rate of 1*s.* for every 10*l.* (See Stamp Act, 1891, 1st Schedule, title, Marketable Security (3.).)

The Divisional Court affirmed the decision of the commissioners. (1)

*Cohen, Q.C.*, and *R. M. Bray*, for the appellant. It is contended first that this bond was not issued in the United Kingdom, but in New York; and secondly, that, on the true construction of s. 82, sub-s. 1 (*b*), (i.), of the Stamp Act, 1891, in order to come within it, the issue in the United Kingdom must be by or on behalf of the foreign company; and that in this case, if the bond was issued in the United Kingdom, it was not so issued by or on behalf of the foreign company.

This bond was issued by the railway company in New York. If the trust company had signed the indorsed certificate in New York, there could have been no doubt that there was an issue there, for there would then have been a perfect instrument payable to bearer executed and delivered in New York. It is submitted that, when the railway company executed and delivered to the trust company, who were not their agents or acting under their control, but were acting on behalf of the joint executive committee, an instrument which the trust company

(1) The Stamp Act, 1891, s. 82, sub-s. 1: "Marketable securities for the purpose of the charge of duty thereon include . . . . (*b*) a marketable security by or on behalf of any foreign state or government, or foreign or colonial municipal body, corporation, or company (hereinafter called a foreign security) bearing date or signed after the third day of June, 1862, (i.) which is made or issued in the United Kingdom."

had the power to make a complete and valid instrument, that amounted to an issue of the instrument. The railway company could not have directed the trust company not to sign the indorsed certificate. There was nothing further to be done by the railway company necessary to make the bonds binding on the company after they left New York. As soon as the company put the instrument into the hands of a third person not their agent, and therefore put it out of their control, so that they could not prevent its being made into a valid instrument, they issued it. The bond is issued subject to a condition, namely, the performance of a mere ministerial act, upon which it becomes a marketable security. It need not be a marketable security when issued. It may be that the bond was turned into a marketable security in London, but it was issued in New York.

Assuming that this bond was issued in London, it was not so issued by or on behalf of the foreign company, for the signing of the indorsed certificate and the delivery of the bond so indorsed were the acts of the trust company, who were acting, not as agents for the railway company, but on behalf of the joint executive committee. The railway company after handing over the bonds in New York had nothing further to do with them. The case finds that under the scheme of reorganisation it was originally intended that the certificates should be signed in New York. The railway company had nothing to do with the arrangement by which the certificates were signed in London.

[They cited *Grenfell* v. *Commissioners of Inland Revenue.* (1) ]

*The Solicitor-General* (*Sir R. B. Finlay, Q.C.*) and *Danckwerts*, for the Crown. Even if the bond had been authenticated by the trustee's certificate in America, the Crown would contend that it was not issued till delivered to the person entitled to receive it in this country in exchange for the certificate of deposit. But it is not necessary for the purposes of this case to go further than to say that the bonds were not issued till they were certified in this country. When these instruments came over to London they were not marketable

(1) (1876) 1 Ex. D. 242.

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securities, for by their express terms they were to have no validity until certified by the trust company. A marketable security cannot be said to be issued before it becomes a marketable security. The bond was not issued until the certificate was signed, and the instrument thereby became one upon which a holder was entitled to sue. The bond cannot be said to be issued until a right of action thereon is given to some holder thereof.

Assuming that the issue in the United Kingdom must be by or on behalf of the foreign company, in order to bring the case within s. 82, sub-s. 1 (*b*), (i.), it is submitted that on the facts of this case it is clear that the bonds were issued in the United Kingdom on behalf of the railway company. The consideration for which the new railway company acquired the property of the old company was the issue of these bonds to the holders of bonds of the old company. The issue of these bonds to such holders on behalf of the new company formed part of the reorganisation scheme which the new company was incorporated to carry out. The bonds were handed over to the trust company to be certified in accordance with the provisions of the mortgage deed executed in pursuance of the scheme to which the new company was party. The certification and handing over of the bonds in this country in pursuance of that scheme must be considered as being done on behalf of the railway company. On this point it must be assumed that the bonds were issued in London. On whose behalf could the bonds be said to be issued in London if not on behalf of the railway company? It is impossible to contend that the bonds were handed over by the railway company to be issued by persons acting otherwise than as agents for the company, for according to that view the company never issued the bonds at all.

*Cohen, Q.C.*, in reply.

A. L. SMITH L.J. I am of opinion that this appeal should be dismissed. It is not necessary for me to state the facts in detail. They may be summarised as follows. There was a company called the Atchison, Topeka and Santa Fé Railroad Company, incorporated under the law of Kansas. In 1895

that company was in difficulties, and a reorganisation scheme was set on foot. By that scheme there was to be a foreclosure suit against the old company, which was to be wound up, a new company was to come into existence in its stead, and the bondholders of the old company were to become bondholders of the new company. The scheme was carried out in 1896. The new company, in pursuance of the scheme, issued bonds, the form of which is very material. There is an express stipulation on the face of the bond that it shall not be valid for any purpose unless authenticated by the certificate thereon indorsed of the trustee under the mortgage or deed of trust. The document seems to me on the face of it not really to be a bond, but a mere piece of paper till that certificate is signed. What happened in this case was this. One of these documents was sent from New York to London in order that it might be handed over to the appellant, who, as having been a bondholder of the old company, was entitled to a bond of the new company. Instead, however, of converting the document into a bond in New York, in order to avoid the payment of a heavy premium for insurance, it was sent over here as an inchoate instrument, and not a bond at all, and the vice-president of the trust company also came over to this country to sign the requisite certificate here and so convert the document into a bond. The certificate having been thus signed, the bond was delivered to Messrs. Baring Brothers & Co., and by them handed over to the appellant. The question which arises is, where was this bond issued? It was contended that it was issued in New York when the piece of paper was given to the trust company. I say certainly not. It is true that a piece of paper was then handed to the trustee, but it cannot be said that a bond was then issued, for it was not. I do not think there can be an issue of an instrument within the statute until it is an actual, valid, subsisting instrument. I think that this bond was first issued in this country after it became a valid instrument by the signing of the indorsed certificate thereon, until which time it was a mere piece of paper and not a bond. I cannot understand how it can be said that a bond has been issued before it is a bond. It became a marketable security when the certificate was

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signed, and not till then. For these reasons I think that the appeal should be dismissed.

RIGBY L.J. I am of the same opinion. The sole question really appears to me to be whether this instrument, which came into the hands of the appellant as the person entitled to it under the scheme of reorganisation, was issued in this country or not, and I cannot entertain any doubt that it was so issued. What is the meaning in any fair sense of the word "issued" in the section? Of course a document is not issued if, when sealed, it is put away in a box and kept there. Nor do I consider that a document, even if it were complete when signed, could be said to be issued, if it were handed over to an agent with instructions that he was not to part with it or make it an instrument on which any one could sue until some consideration was received, as in the case of an ordinary mortgage deed which is sealed but is not to be handed over to the mortgagee or to become an effective mortgage deed until the mortgage money is paid. It seems to me impossible to argue that in such cases there could be said to be an issue in America, even if the document were complete when signed, if it were only to be handed over to the person who was to sue upon it upon something been done, as, for example, on paying the consideration money. An instrument can only be said to be issued in my opinion when it gets into the hands of a person who can avail himself of it. It seems to me that that is the ordinary meaning of the word "issued," and at any rate its meaning in the Act which we have to construe. When this document was executed by the company in America, had everything been done that was necessary to make it an available instrument? Certainly not. On the contrary, it was guarded by a condition on the face of the document that it should have no validity until certified by the trust company. It was argued that, as the trust company were dealing with the matter under the orders and directions of the joint executive committee, the bond had gone beyond the control of the railway company, and that constituted the test as to whether it had been issued. I cannot accede to that view. In the instance which I gave of an instru-

ment being sent to an agent with instructions to deliver it to a person on payment of the consideration money, the instrument would be beyond the control of the sender in the sense in which this bond was beyond the control of the railway company. The company had a bargain which was to be fulfilled, and, unless it were fulfilled, they could not get the advantages for which they had bargained. During the transmission of the document from New York, and until the certificate was signed, no one could sue on it. Until the certification there could be no issue. I do not say that there was an issue upon the certification; but when the certified bond, being then a complete instrument, which might be sued upon if handed over to a person who was entitled to it, was handed over to such a person, I do not doubt there was an issue. There can be only one issue within the meaning of the Act, and that is when the instrument first gets into the hands of some one who can make it available for his benefit.

It was argued that s. 82, sub-s. 1 (*b*), (i.), of the Act must be construed as if it said "issued by or on behalf of the company." I do not say that that is the true construction of the Act, but I will accept it for the present purpose. I think however that the bond was issued in this country on behalf of the railway company. Suppose a company or any person has purchased property and hands over the consideration money to an agent saying to him, "Go and pay that money in order to get me that property," surely the money in such a case would be paid on behalf of the purchaser. In one sense it is paid on behalf of the person who is to receive it, but it is paid on behalf of the purchaser because he wishes it to be paid in order to secure the advantages of the purchase. Here I think the bond was issued on behalf of the company when it was handed over duly certified in London to the person entitled to it.

With regard to the case of *Grenfell* v. *Commissioners of Inland Revenue* (1), if the statement in the head-note fully represented the facts of the case, I should feel some difficulty as to the decision, because it would appear from that statement that the bond there in question was an incomplete instrument

(1) 1 Ex. D. 242.

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Rigby L.J.

when it left New York. But, when one looks at the operative part of the instrument as set out in the body of the report, it appears that it was a covenant to pay the legal holder, and the bond was therefore a perfect legal instrument when it was handed over to the appellant in New York, and he was then and there entitled to transfer it. The passages in the judgment of Pollock B. in that case relied on by the appellant's counsel, instead of bearing the meaning which he attributed to them, seem to me to be in favour of the decision we are now giving; for what he says in substance is that an instrument is issued when it is delivered under such circumstances as to confer a right of action. I understand him to mean that these conditions must be complied with as a general rule. There must be an instrument handed over which in the condition and in the place in which it is handed over has a legal operation and gives a right of action. I doubt whether there are any circumstances in which there could be a real issue unless those conditions were complied with. In this case there can be no doubt, in my opinion, that there was no issue in New York, and that there was an issue at the moment when the instrument, being then a perfect instrument, was handed over to the appellant in London. For the reasons I have given I think this appeal must be dismissed.

COLLINS L.J. I am of the same opinion. The question is whether the bond to which the case relates is a marketable security by or on behalf of a foreign company made or issued in the United Kingdom. The points taken by the appellant are—(1.) that there was no issue of the bond at all in the United Kingdom, the issue having taken place in New York, and (2.) that, if a marketable security was issued in the United Kingdom, it was not so issued by or on behalf of the foreign company. I think that the grounds upon which I propose to base my judgment dispose of both these points simultaneously. This bond was given in pursuance of the scheme of reorganisation of which the general scope was that the new company should take over the assets of the old company, and in return should give to the bondholders of the old company their own

bonds in substitution for the bonds of the old company. This arrangement involved certain machinery, it being necessary that the title of persons claiming to be bondholders of the old company should be verified, and that bonds should not be handed over unless the new company were satisfied that the persons to whom they were being handed over had a right to them. That being so, a form of bond was prepared and executed by the new company, which contained a clause providing that the bond should not be valid for any purpose unless authenticated by the certificate thereon indorsed of the trustee under the mortgage or deed of trust. Having made that provision on the face of the bond, they delivered it out in New York for the purpose of its being in due course authenticated, and then passed on to the person entitled to it in exchange for the old bond. They so delivered out the instrument with the intention that the machinery which is elaborately provided by a number of agreements should be put into operation with regard to it, and that the instrument should go through the process therein contemplated and become authenticated, and then, and not till then, it should be issued as a marketable security to the person entitled thereto. That was the scheme. Now let us see where geographically that scheme was carried out. The document came into existence in an inchoate form, as my Lord has said, in New York. It was delivered out with the clause which I have mentioned on the face of it, but it was not then authenticated. It being found that, if the certificate was put upon it in America, the payment of a higher premium for insurance would be involved, steps were deliberately taken to make it certain that the instrument could not be deemed to be complete or to be issued before it reached England, and the vice-president of the trust company was sent over to sign the certificate in this country. The bond having reached this country received authentication here, and was then handed by the depositaries, Messrs. Baring Brothers & Co., to the appellant. The question is whether what took place amounted to an issue of the bond in this country. It appears to me that it had all the elements of such an issue, and that that issue was made on behalf of the company, what was done being

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done in pursuance of the general scheme for the issue of the new bonds by the company in exchange for the old bonds, not by persons acting independently of, or against, or without any instructions from the company, but by persons designated under the scheme as the persons who were to carry it out. I think that, when those persons passed on the bond, having received it under the circumstances under which they received it, they were issuing it on behalf of the company. This compendious view of the case disposes of both the points raised. The issue—and in my judgment the only issue—of the bond was in England, and all the steps anterior to that were merely preliminary steps to the ultimate object, which was the issue of a marketable security to the person entitled to hold it, which took place in London. The issue of the bond was on behalf of the company; for, though the trustees (i.e. the trust company), were in one sense the mandatories of the persons who were to receive the bonds, as such mandatories they were part of the machinery provided under the general scheme for effecting the whole operation contemplated, and were, so to speak, conduit-pipes or links in the chain by which the bonds were to be carried from the company to the persons ultimately entitled to receive them. For these reasons I am of opinion that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors for appellants: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

E. L.

[IN THE COURT OF APPEAL.]

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*Nov.* 17.

BRICKWOOD AND COMPANY, LIMITED, APPELLANTS; REYNOLDS (SURVEYOR OF TAXES), RESPONDENT.

*Revenue—Income Tax—Deductions—Balance of Profits and Gains—Brewery Business—Repairs to Tied Houses—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. D.*

The provision of s. 100, case 1, rule 3, of 5 & 6 Vict. c. 35, which authorizes a deduction, in estimating the balance of profits and gains of a trade, in respect of the expenditure on repairs of "premises occupied for the purpose of such trade," applies only to premises occupied by the person assessed for the purpose of his trade.

The appellants, a firm of brewers, in order to increase their trade, purchased licensed houses which they let to tenants who contracted to buy from them all the beer, wines, and spirits to be sold therein. By reason thereof the appellants' profits had been materially increased. The repairs to these houses were executed and paid for by the appellants, and they claimed in arriving, for the purpose of the income tax, at the balance of the profits and gains of their trade, to be entitled to a deduction in respect of the sum expended on those repairs:—

*Held*, that the appellants were not entitled to any deduction in respect thereof.

APPEAL from the judgment of the Queen's Bench Division on a case stated for the opinion of the Court by the Commissioners for the General Purposes of the Income Tax Acts under the Taxes Management Act, 1880 (43 & 44 Vict. c. 19) s. 59.

At a meeting of the commissioners for the purpose of hearing appeals under the Income Tax Acts for the year ending April 5, 1897, Messrs. Brickwood & Co., Limited, who carried on the business of brewers and maltsters, appealed against an assessment of 20,973*l.* made on them under 16 & 17 Vict. c. 34, s. 2, Sched. D, in respect of the profits of their trade. They claimed to have the assessment reduced by 1492*l.*, being the balance of 2496*l.* expended by them in the repair of certain licensed houses, of which they were the owners and which they had let to tenants, after deducting from such sum 1004*l.*, being one-sixth

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of the annual value of such houses under 16 & 17 Vict. c. 34, s. 2, Sched. A.

The appellants had from time to time, in order to increase their trade, bought licensed houses, which they let to tenants under written agreements. By each of these agreements, which were in the same form, the appellants agreed to let and the tenant agreed to take the house for six months certain at a fixed rent, subject to three months' notice at any time after the expiration of the first three months of the tenancy, and the tenant agreed during the continuance of the tenancy to buy from the appellants all the ale, beer, and other malt liquors, and wines and spirits to be sold in such house: provided always that if the tenant should be convicted of any offence against the licensing law the appellants might determine the tenancy by giving seven days' notice. The houses were called "tied" houses.

The appellants' profits were earned by manufacturing ale, beer, and other articles and selling them to private persons, to the owners of "free" licensed houses, and to the tenants of their "tied" licensed houses. The whole of the profits so made were included in the assessment. Such profits were materially increased by the increased sale of their goods, due to the possession by them of their tied houses, and also by their having obtained for the same class of goods a higher price from the tenants of the tied houses than they were able to obtain from their other customers.

In no case had the tenants of the tied houses spent any money on the repairs thereof. The repairs were executed by the appellants, and, after deducting that portion of the cost of the repairs which was in the nature of capital outlay or which tended to the permanent improvement of the premises, the balance properly attributable to revenue was the above-mentioned sum of 2496*l*. The tied houses were in the possession of the tenants in part for the purpose of the trade of licensed victuallers and beer retailers, and in part as the private dwelling apartments of themselves and their families. The repairs in question had been executed indifferently to both parts of such houses.

In addition to their tied houses, the appellants owned other

licensed houses which they occupied by their managers or servants, and in respect of these and of the brewery and other premises admittedly occupied by them for the purpose of their trade they were allowed for repairs, before the assessment was made, the full sum to which they were entitled under 5 & 6 Vict. c. 35, s. 100, case 1, rule 3. They also received in respect of the whole of the licensed houses owned by them the deduction from the annual value under 16 & 17 Vict. c. 34, s. 2, Sched. A, to which they were entitled under s. 35 of the Finance Act, 1894 (57 & 58 Vict. c. 30). Such deduction had in the case of their licensed houses not let to tenants and of their brewery and other premises been made before ascertaining the allowance to be made for repairs under 5 & 6 Vict. c. 35, s. 100, case 1, rule 3.

The appellants contended:—

(1.) That the purchasing and letting of licensed houses was an essential part of their business as brewers and maltsters, and alternatively that it was a separate business.

(2.) That but for such purchasing and letting their profits as assessed under Sched. D could not have been earned.

(3.) That the repairs in question were a necessary outlay without which such profits could not have been earned, and formed a legitimate deduction in arriving at the balance of profits and gains in respect of which they were chargeable under Sched. D.

(4.) That the tied houses were "occupied" for the purpose of their trade within the meaning of 5 & 6 Vict. c. 35, s. 100, case 1, rule 3, and that in this respect there was no distinction between such houses and those houses which were conducted on their behalf by their managers or servants.

The respondent contended:—

(1.) That the tied houses were not "occupied" by the appellants within the meaning of 5 & 6 Vict. c. 35, s. 100, case 1, rule 3.

(2.) That the appellants must be deemed to have executed the repairs in question not quâ traders, but quâ landlords, and that as such they had received the one-sixth deduction from the annual value under 16 & 17 Vict. c. 34, s. 2, Sched. A, to

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which they were entitled under s. 35 of the Finance Act, 1894.

The commissioners were of opinion that the appellants were not entitled to the deduction claimed.

The question for the opinion of the Court was whether the commissioners were right.

The Divisional Court (Pollock B. and Ridley J.), upon the authority of *Watney* v. *Musgrave* (1), gave judgment for the Crown. (2)

The appellants appealed to the Court of Appeal.

*J. Lawson Walton, Q.C.*, and *R. D. Muir*, for the appellants. In estimating the profits of the trade the appellants are entitled to deduct the sum expended by them in the repairs of their tied houses. They bought these houses for the purpose of increasing their trade, and their profits have been largely increased thereby. The houses are in the nature of depots for the exclusive sale of the appellants' beer, wines, and spirits

(1) (1880) 5 Ex. D. 241.

(2) 5 & 6 Vict. c. 35, s. 100, Sched. D, First Case: "Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act."

Rule 1: "The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, upon a fair and just average of three years . . . . and shall be assessed, charged, and paid without other deduction than is hereinafter allowed. . . . ."

Rule 3: "In estimating the balance of profits and gains chargeable under Sched. D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern . . . . beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made. . . . ."

"Rules applying to both the preceding cases (cases 1 and 2). First: In estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains, for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern. . . . ."

Sect. 159: "In the computation of duty to be made under this Act . . . . it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act. . .

and they form part of the machinery for distributing the beer and other articles. The houses are therefore "occupied for the purpose of such trade" within the meaning of 5 & 6 Vict. c. 35, s. 100, case 1, rule 3. For this purpose the tied houses are in the same position as those houses in which the appellants carry on their trade by means of managers or servants, and the full sum expended for repairs in the case of the latter houses has been allowed. The statute merely uses the words "occupied for the purpose of such trade." It does not specify the person who must be the occupier. It regards the character of the occupation, not the person by whom the house is actually occupied. It is sufficient if the house is occupied for the purpose of the appellants' trade, even though the tenant also has an interest in the trade of the house out of which he gets a profit. The object of the expenditure on repairs was not to obtain increased rents for the houses; the only object was to increase the trade profits of the appellants' business. Any question of increased rents consequent upon the expenditure on repairs has been dealt with under Sched. A. The expenditure on these repairs therefore, which is properly attributable to revenue, can be deducted. Moreover, this is not properly a deduction from profits, as it ought to be brought into the account before arriving at the profits at all. "Profits" were defined by Lord Herschell in *Russell* v. *Town and County Bank* (1) as "the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts," and then he dealt with the deductions allowed by the statute. That shews that the profits of the trade cannot be arrived at until after the deduction claimed has been allowed. The decision in *Watney* v. *Musgrave* (2) was right because the premiums paid for the leases of the houses were clearly not attributable to revenue, and so could not be deducted in arriving at the annual profits. But the reasons given by the judges are wrong, as they based their judgment on the ground that the deductions must be confined entirely to the expenses incurred in or incidental to the production of the

(1) (1888) 13 App. Cas. 418, at p. 424.

(2) 5 Ex. D. 241.

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article. In *Reid's Brewery Co.* v. *Male* (1) it was held that bad debts incurred by brewers in a business carried on by them as a part of their brewery business could be deducted from the taxable profits of the brewery business. That case is in point, as the business of buying tied houses and distributing beer by means of those houses is part of the appellants' business.

Again, rule 1 of the rules applicable to the two first cases in s. 100 does not prevent this deduction being made, as the expenses incurred for repairs were money wholly and exclusively laid out for the purpose of the appellants' trade, the only object of the expenditure being the earning of their trade profits: *Watson* v. *Royal Insurance Co.* (2), though no doubt there was a subordinate user of the house for domestic purposes by the tenant. Nor does the prohibition in s. 159 apply, because the only deductions "expressly enumerated" in the Act are those under Scheds. A and B.

*The Attorney-General* (*Sir R. E. Webster, Q.C.*) and *Danckwerts*, for the Crown. The tied houses were carried on for the profit of the tenants, and this expenditure on repairs was laid out for the purpose of improving the position of the tenants and increasing their trade, and to enable a higher rent to be obtained for the houses, though indirectly it would increase the appellants' trade and add to their profits. *Watney* v. *Musgrave* (3) was rightly decided, and this case falls within it. The money spent on repairs was not spent as part of the trade expenses of the brewery. Sect. 100, case 1, rule 3, of the Act of 1842, though in the form of a prohibition, no doubt sanctions a deduction in respect of repairs of premises "occupied for the purpose of" the trade, and s. 159 prohibits any other deductions than those expressly enumerated in the Act. Those words mean "occupied by the party assessed for the purposes of his trade." That is the only reading that will make the section reasonable. These tied houses are occupied in truth by the tenants for the purposes of their trade, and stand in a different position from the houses occupied by the appellants through

(1) [1891] 2 Q. B. 1. (2) [1896] 1 Q. B. 41.
(3) 5 Ex. D. 241.

their own managers and servants. Further, by rule 1 of the rules applicable to the first and second cases in s. 100, no sum is to be deducted which is not wholly and exclusively laid out for the purposes of such trade, that is, the assessed person's trade. In the present case, apart from any question as to the repairs to the domestic parts of the houses, these repairs were done for the sake of the tenants, and in order to get good tenants and increased rents from the houses, and the money expended on them was not wholly and exclusively laid out for the purpose of the appellants' trade. In *Reid's Brewery Co.* v. *Male* (1) the Court came to the conclusion that there was only one business carried on, and they held therefore that the deduction must be made before arriving at the profits of the trade. A deduction of one-sixth has been allowed from the annual value of these houses under Sched. A in respect of repairs, to which the appellants were entitled under s. 35 of the Finance Act, 1894, and they cannot claim it under Sched. D.

*J. Lawson Walton, Q.C.*, in reply. In claiming the deduction under Sched. D, the appellants have given credit for the one-sixth allowed on the annual value of the houses under Sched. A, and so no question of any double deduction arises.

A. L. SMITH L.J. In my opinion the judgment of the Court below must be affirmed. The facts as stated in the case are shortly these. The appellants are brewers, and have from time to time, for the purpose of increasing their trade, been buying licensed houses, which they let to tenants as tied houses. They own a number of these tied houses, and they have been selling beer and other articles to the owners of what are called free licensed houses as well as to the tenants of these tied houses. Owing to the fact that they own the tied houses, they are enabled to sell more beer than they would otherwise do, and they get a better price for the beer sold to the tenants of these houses than they can obtain from their other customers. These tied houses are let to publicans under written agreements for terms of six months, subject, at any time after the first three months, to three months' notice to quit, and subject to a

(1) [1891] 2 Q. B. 1.

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A. L. Smith L.J.

proviso for putting an end to the tenancy on seven days' notice in the case of misconduct on the part of the tenant. It is contended that, inasmuch as the tenants of these tied houses have not contracted to repair them, in estimating the balance of the profits and gains of the brewer's business under Sched. D, a deduction should be made in respect of the cost of repairing the houses of the tied tenants.

Now there are two things wholly distinct and apart the one from the other, the trade of a brewer and the trade of a publican, and the expense incurred in respect of the latter cannot in my judgment be deducted when finding out the profit of the former. When the brewer is making up his balance of profits and gains, he would on the one side place to his credit the beer and other articles sold and paid for, and on the other side he would place to debit the necessary expenditure for earning those receipts, and the difference between the two would, as Lord Herschell pointed out in *Russell* v. *Town and County Bank* (1), be the balance of the profits and gains of the trade on which the brewer would have to pay income tax. But the contention of the appellants comes to this—that inasmuch as by doing the repairs to the tied houses they keep up and foster the trade of the publican, which is a wholly independent trade, they are entitled to deduct the cost of the repairs to the publicans' houses before arriving at the balance of the profits and gains of their own trade as brewers. I am of opinion that that contention cannot prevail, and I agree with what Hawkins J. said in *Watney* v. *Musgrave*. (2)

Moreover, looking at the provisions of the Income Tax Acts, I think that the Attorney-General is right when he says that there is an express prohibition to be found in those Acts against such a deduction as this. By 5 & 6 Vict. c. 35, s. 100, case 1, rule 1, "The duty to be charged in respect thereof"—that is, of any trade, manufacture, adventure, or concern in the nature of trade—"shall be computed on a sum not less than the full amount of the balance of the profits or gains"—I have already stated what those are—"of such trade, manufacture, adventure, or concern upon a fair and just average of three years"; and

(1) 13 App. Cas. 418, at p. 424. (2) 5 Ex. D. 241, at p. 246.

by rule 3, "No sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern." Pausing there, what is the meaning of the word "occupied"? To my mind, the plain meaning is occupied by the person assessed. The enactment will then read, "on account of any sum expended for repairs of premises occupied by the person assessed for the purpose of such trade"—that is, for the purpose of the trade of the person assessed—"beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made." Although, curiously enough, this provision is drafted in the form of a prohibition, it contains a permission also, and provides in effect that such a deduction may be allowed for repairs of premises occupied by the person assessed for the purpose of his trade not "beyond the sum usually expended for such purposes according to an average of three years preceding." This case does not come within the permission, but, as it seems to me, within the prohibition; so that the deduction claimed is not merely not allowed, but it is expressly disallowed by this part of the Act.

There is a further provision in the rules applying to both cases 1 and 2, rule 1 of which provides that "in estimating the balance of the profits or gains to be charged according to either of the first or second cases, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade." In my opinion that provision also covers the present case. It is impossible to say, upon the facts stated in this case, that the whole of the money expended in the repairs of these tied houses was money expended exclusively for the purposes of the appellants' trade as brewers. It was expended for many other things, one being for the purposes of the trade of the publicans who occupied those houses. The judgment of the Court below must therefore be affirmed.

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RIGBY L.J. I am of the same opinion. It is startling to consider to what we should be committing ourselves if we accepted the appellants' contention. Take a brewery company with a large amount of spare capital in hand. The company own land, and, having power to do so, build a small town round the brewery. It may not be worth the company's while to do that except for the purpose of increasing their trade in beer, and if they take a contract from the tenants of their houses to buy beer only from them, it appears to me that a similar state of things to that existing here would be created. In both cases there is an expenditure the motive of which is to bring additional profits to the brewery, and in neither case is there any occupation by the brewers of the houses in question for the purposes of their trade.

We must take care, therefore, not to travel beyond the words of the Act, and we have to inquire what the Act says. I read s. 100, case 1, rule 3, of the Act of 1842 as containing at once a permission and a restriction. No deduction is to be made "on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes according to an average of three years preceding." That is a permission to take into account that average of expenditure, and a prohibition against taking anything else into account. In my opinion, in dealing with the words "premises occupied for the purpose of such trade," it is impossible to say that a house, which is in fact occupied by a publican for the purpose of his carrying on his trade and for making a profit there, is in any sense occupied at the same time for the purpose of the trade of the brewery, although the brewers, when they bought the house, knew that they would obtain a good customer in the publican, and from him and not from the property make their profits.

It was said on behalf of the appellants that this is not in truth a deduction from the profits, because it is expenditure which ought to be dealt with before the profits are arrived at. Would it not be idle for the Legislature to prohibit the deduction if the person assessed could say that he did not want it in

the shape of a deduction, as he was entitled to bring the expenditure into the account before arriving at the profits? In truth, everything that is taken away from the gross profits of the trade is necessarily a deduction, and, in my opinion, there is an express prohibition here against that deduction.

Again, when I turn to a later provision in the Act under the rules applying to both cases 1 and 2, I find that rule 1 provides that "in estimating the balance of the profits or gains"—that is, in arriving at the taxable sum—"no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade." In my opinion, this money, which was expended in the repair of these tied houses, was not expended wholly and exclusively for the purposes of the trade. Even if it were conceded that the money was expended partially for the purposes of the trade—I am not at all sure that even that can be legitimately conceded—it certainly is not wholly and exclusively so expended. The appeal must therefore be dismissed.

COLLINS L.J. I am of the same opinion and on the same grounds.

*Appeal dismissed.*

Solicitors for appellants: *Godden, Son & Holme.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

E. L.

1897
*Nov. 2.*

## THE LONDON COUNTY COUNCIL, APPELLANTS; THE AYLESBURY DAIRY COMPANY, LIMITED, RESPONDENTS.

*Metropolis—Buildings—Notice to Set Back—Forecourt or Space—Boundary Wall—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), s. 14 (*Local and Private*).

Sect. 14 of the London Building Act, 1894, does not empower the London County Council to give notice requiring the owner or occupier of land, upon part of which he has erected a new building, to set back an old boundary wall, forming the boundary of a space left between the new building and a street, so that the wall shall not be at less than the prescribed distance from the centre of the roadway of the street.

CASE stated under the Summary Jurisdiction Acts by one of the metropolitan police magistrates sitting at the Marylebone Police Court.

The respondents appeared before the magistrate on a summons to answer a complaint that they had, contrary to ss. 14 and 200, sub-s. 2, of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), neglected to comply with a notice duly served upon them by the London County Council requiring them to cause the space between the external wall of a new building and the roadway of a road called Moscow Road to be set back, so that every part of the external fence or boundary of such space should be at a distance in every direction not less than the prescribed distance from the centre of the roadway. (1)

(1) The London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), Part II., s. 13, sub-s. 1: "No person shall erect any new building or new structure or any part thereof, or extend any building or structure or any part thereof, in such manner that any external wall of any such building or structure (or if there be a forecourt or other space between such external wall and the roadway) any part of the external fence or boundary of such forecourt or other space shall without the consent in writing of the county council be in any direction at a distance less than the prescribed distance from the centre of the roadway of any street or way (being a highway)."

Sect. 14: "In every case where any new building or new structure is erected at a distance in any direction from the centre of the roadway of any street or way less than the distance permitted under this part of this Act

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The following material facts were proved at the hearing of the complaint:—

The respondents had, since the London Building Act, 1894, came into force, erected a new building with a frontage to and entrance from Moscow Road. The external wall of the building fronting Moscow Road was at a distance of not less than twenty feet from the centre of the roadway, twenty feet being the distance prescribed under the Act. Moscow Road is a highway and a street used for the purposes of carriage traffic. At the time when the building was erected, and for many years prior thereto, there existed a boundary wall which had been the boundary wall of a garden. A portion of this wall was left standing, and after the completion of the new building the space between it and the old boundary wall was inclosed by the respondents by means of iron railings affixed to the wall. This wall had for many years formed the external fence or boundary of the space between the external wall of an old building and the roadway of Moscow Road, and was at a distance of thirteen feet from the centre of the roadway. The appellants' complaint was in respect of the old boundary wall only, and not in respect of the iron railings.

The respondents were the occupiers of the premises in question at the time the notice requiring them to cause to be set back the old boundary wall was given by the appellants. The

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or contrary to the conditions and terms (if any) subject to which the council or the tribunal of appeal has sanctioned the erection of such building the council may serve a notice upon the owner or occupier of the said building or structure or upon the builder requiring him to cause such building structure forecourt or space or any part thereof to be set back so that every part of any external wall of such building or structure or of the external fence or boundary of such forecourt or space shall be at a distance in every direction from the centre of the roadway of such street or way not less than the distance so permitted and shall be in accordance with such conditions and terms (if any) as the council or the tribunal of appeal may have prescribed."

Sect. 200, sub-s. 2: "Every person who neglects or refuses for twenty-eight days after the service of any notices empowered to be served under Part II. of this Act requiring him to set back any building or structure to comply with the requirements of such notice . . . . shall be liable to a penalty. . . ."

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respondents refused to comply with the requirements of the notice for twenty-eight days after the service thereof upon them, and no consent had been given by the appellants to the erection of the new building with any forecourt or space between the external wall of such building and the roadway of Moscow Road in the manner complained of. The magistrate dismissed the summons, being of opinion that, under the circumstances, s. 14 of the London Building Act, 1894, did not apply so as to entitle the appellants to give the notice. The question for the opinion of the Court was whether the magistrate's decision was right in law.

*H. Avory*, for the appellants. A boundary wall such as this is not, it must be admitted, a structure within ss. 13 and 14 of the London Building Act, 1894: *Lavy* v. *London County Council* (1); and the owner or occupier of a building or structure which he is required to set back is entitled to notice before he can be proceeded against for a penalty. But it is clear that the words "forecourt or space" have been omitted from the earlier part of s. 14 per incuriam; if they be not read in, the words "such forecourt or space" in the latter part are insensible. Words may be read into a statute where it is necessary to supply an omission in order to give effect to what was obviously intended by the Legislature: *In re Wainewright* (2); *Reg.* v. *Hulme*. (3) It is submitted that the notice given by the appellants was good, and the magistrate ought to have convicted.

*John Rawlinson*, for the respondents, was not heard.

WRIGHT J. I think that counsel for the appellants was perhaps right in saying that s. 14 was probably intended to cover such a case as the present, and probably was also intended to cover the case, not merely of the erection of new buildings, but of an extension of old buildings, although it has not been necessary to argue that question to-day. But the

(1) [1895] 1 Q. B. 915; 2 Q. B. 577. (2) (1843) 1 Ph. 258.
(3) (1870) L. R. 5 Q. B. 377.

mere fact that it may have been better to extend the section to those cases, or that one can apparently gather that such an intention was probable, is not enough to justify us in putting a construction upon the section which would necessitate reading into it the words which the appellants' counsel has invited us to read in. It is clear to my mind that we should, as the Court of Queen's Bench said in *Underhill* v. *Langridge* (1), "be taking upon ourselves the office of the Legislature." We should be doing that which the Court, in *In re Sneezum, Ex parte Davis* (2), declined to do with respect to a provision which, it was suggested, ought to be read into s. 23 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71). James L.J. said (3): "That is a provision which might perhaps be very properly made by the Legislature, but, to my mind, to insert it in this way by implication would not be to construe the Act of Parliament, but to alter it; it might be to improve it, according to the view which some persons take of the matter, but it would certainly be altering the Act of Parliament, and enlarging still further the provisions which the Legislature has thought fit to make with respect to such contracts." I am the more strongly driven to this conclusion because the proceeding here is penal, involving penal consequences, and without making the alteration in s. 14 which we are asked to make, it could not be prosecuted at all. I have certainly always understood the rule to be that where there is an enactment which may entail penal consequences, you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language. I am of opinion that the learned magistrate was right, and that if there be mischief consequent upon the ruling which we are bound to give, that mischief is something which must be removed by application to Parliament. I may add, though we are not asked to decide the point in the present case, that it is doubtful whether s. 13 applies. It may be that no wall of a forecourt or space is

(1) (1859) 29 L. J. (N.S.) (M.C.) 65. (2) (1876) 3 Ch. D. 463.
(3) 3 Ch. D. at p. 472.

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within that section unless it is erected at the time when the building in question is erected or altered.

KENNEDY J. concurred.

*Judgment for the respondents.*

Solicitor for appellants: *W. A. Blaxland.*

Solicitors for respondents: *Harries, Wilkinson & Raikes.*

W. A.

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## THE QUEEN *v.* MEAD.

*Metropolis — Building — Service of Notices—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), s. 188 (*Local and Private*)—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), s. 1.

By s. 188 of the London Building Act, 1894, any notice, order, or other document required to be served under that Act, the service of which is not provided for by the Summary Jurisdiction Acts, may be served, if no person be found on the premises to which it relates, by fixing a copy on some conspicuous part of the building to which it relates. By s. 1 of the Summary Jurisdiction Act, 1848, a summons issued upon any information or complaint shall be served by delivering it to the person to whom it is directed, or by leaving it with some person for him at his last or most usual place of abode. A summons issued upon a complaint made under the London Building Act, 1894, and addressed "To the owner" of a building alleged to be in a dangerous condition, was served by fixing a copy of the summons on a conspicuous part of the building. The premises were said to be unoccupied. The owner did not appear on the summons:—

*Held* that, in the absence of evidence that reasonable inquiry had been made to find out who was the owner so that he could be served under s. 1 of the Summary Jurisdiction Act, 1848, the provisions of s. 188 of the London Building Act, 1894, were not applicable, and therefore that the service was bad.

RULE, calling upon one of the metropolitan police magistrates to shew cause why he should not hear and determine the matter of a complaint.

A summons was granted by a metropolitan police magistrate upon a complaint, made on behalf of the London County Council, that the owner of a certain structure in Dunstan Road, in the parish of St. Leonard, Shoreditch, had failed to

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comply with a notice requiring him, under s. 106 of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), to do certain work for the purpose of securing and repairing such structure, which had been duly certified to be in a dangerous condition.

The summons was returnable before F. Mead, Esq., the magistrate sitting at the Thames Police Court, whose affidavit, made in opposition to the rule, stated the facts appearing before him when the summons came on to be heard as follows:—

The summons was addressed "To the owner" (of the premises in question) merely. The owner was called upon to appear in the ordinary way, but there was no response. The complainant proposed to proceed in the absence of the defendant, and upon the magistrate calling for proof of the service of the summons, a constable gave evidence that he had affixed a copy on the premises, which were unoccupied. It was stated by the complainant that the owner was unknown, but no evidence was given that any steps had been taken to discover him. There was no evidence even that the valuation list or rate-book had been examined, or the rate-collector interrogated, or other obvious means taken with a view to discover who the last owner or occupier was, although such inquiries would, in all probability, have led to the identity of the owner being established.

The magistrate was of opinion that the service of the summons was service of a "notice" within s. 188 of the London Building Act, 1894 (1), and was a notice the service of which is provided for by the Summary Jurisdiction Acts, and must, therefore, be served, under s. 1 of 11 & 12 Vict.

(1) The London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 188: "Any notice order or other document required or authorized to be served under this Act the service of which is not provided for by the Summary Jurisdiction Acts . . . . may be served by delivering a copy thereof at or by sending a copy thereof by post in a registered letter to the usual or last known residence in the United Kingdom of the person to whom it is addressed, or by delivering the same to some person on the premises to which it relates, or if no person be found on the premises then by fixing a copy thereof on some conspicuous part of the building to which it relates . . . ."

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c. 43 (1), personally or at the last known place of abode. He was also of opinion that, even if a summons addressed "to the owner," in a case where the owner could not be found, was not "provided for by the Summary Jurisdiction Acts," there should be evidence before the magistrate that reasonable diligence had been exercised by the complainant to discover the owner. He, therefore, held that there had not been a valid service of the summons, and refused to hear the complaint.

This rule was thereupon obtained on behalf of the London County Council.

*Henry Sutton*, for the magistrate, shewed cause. Sect. 188 of the London Building Act, 1894, only applies where it is shewn that service cannot be effected under s. 1 of the Summary Jurisdiction Act, 1848. There is no evidence here that any real inquiry was made as to who was the owner, and until it is shewn that he cannot be identified after reasonable inquiry service under s. 188 cannot be effected. The decision in *Reg.* v. *Mead* (2) turned on a different statute, and is not in point. If s. 188 did apply there must, in order to make a service by affixing the notice on the premises good, be some evidence that inquiry has been made and the owner cannot be found. There was no satisfactory evidence of that here.

*H. Avory*, for the London County Council, supported the rule. It was stated before the magistrate that the premises were unoccupied, and the owner was unknown. Service under s. 1 of the Summary Jurisdiction Act, 1848, could not be effected, and s. 188 of the London Building Act, 1894, applied. The service under that section was, therefore, good.

WRIGHT J. I think that this application for a rule against the magistrate fails on two grounds. The first is the narrow ground that, supposing the procedure under s. 188 applicable, the evidence was not sufficient under that section, because it

(1) By 11 & 12 Vict. c. 43, s. 1, a summons issued upon any information or complaint before justices at petty sessions "shall be served . . . . upon the person to whom it is directed by delivering the same to the party personally, or by leaving the same with some person for him at his last or most usual place of abode."

(2) [1894] 2 Q. B. 124.

does not appear that there was evidence given to the effect that no person was to be found on the premises. But the wider and more important ground is on the general construction of s. 188. It seems to me that the true construction is that where the person can be identified by reason of an inquiry—not a prolonged or expensive inquiry, but by ordinary inquiry—then it is right that the procedure under Jervis's Act should be followed, because that is the procedure most likely to bring the matter to his attention. But if after reasonable inquiry, such as every constable knows how to make in the course of a few minutes, it cannot be discovered who the owner is, then it seems to me that s. 188 is applicable. In the present case I think that the magistrate was quite right in saying that there had not been quite enough inquiry on the part of the constable. We have nothing to shew that he would not have been satisfied by a very moderate amount of inquiry indeed, but there is no evidence before us that there was any.

KENNEDY J. I am of the same opinion.

*Rule discharged.*

Solicitor for magistrate: *The Solicitor to the Treasury.*
Solicitor for London County Council: *W. A. Blaxland.*

W. A.

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*Nov.* 2.

## GALLAGHER, Appellant; RUDD and Others, Respondents.

*Distinguished.* Green v. Thames Launches [1952] 2 Q.B. 725

*Licensing Acts—Offences—Keeping open Premises during Prohibited Hours—Theatres—Licensing Acts*, 1872 (35 & 36 *Vict. c.* 94), *s.* 72; 1874 (37 & 38 *Vict. c.* 49), *ss.* 3, 9.

The Licensing Act, 1874 (which is to be read as one with the Licensing Act, 1872), provides (ss. 3, 9) that all premises in which intoxicating liquors are sold by retail shall be closed at certain specified times; and penalties are imposed on persons keeping open such premises during the prohibited times. Sect. 72 of the Licensing Act, 1872, provides that "nothing in this Act shall affect or apply to the sale of intoxicating liquors by proprietors of theatres, in pursuance of the Acts in that behalf":—

*Held*, that s. 72 of the Act of 1872 did not apply to exempt the proprietor of a theatre, who held an excise licence to sell intoxicating liquors by retail at his theatre, from the provisions, with respect to closing, contained in the Act of 1874.

Case stated for the opinion of the Queen's Bench Division by the Court of Quarter Sessions for the county of Durham.

The appellant was convicted by a court of summary jurisdiction, held in and for the borough of Stockton-on-Tees in the same county, for having, on the night of Saturday, January 23, 1897, kept open for the sale by retail of intoxicating liquors certain premises, namely, the Theatre Royal, Stockton-on-Tees, contrary to the provisions of s. 9 of the Licensing Act, 1874 (37 & 38 Vict. c. 49). (1)

On appeal against the conviction to quarter sessions the Court dismissed the appeal subject to this case.

(1) The Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 3: "All premises in which intoxicating liquors are sold by retail shall be closed as follows: . . . . sub-s. 2, if situate beyond the metropolitan district . . . . or in a town . . . . as defined by this Act,—

"(*a*) On Saturday night from eleven o'clock until half an hour after noon on the following Sunday."

Sect. 9: "Any person who—

"During the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this Act, . . . . keeps open such premises for the sale of intoxicating liquors shall be" liable to certain specified penalties.

The appellant was the actual and responsible manager of the Theatre Royal, Stockton-on-Tees, and was, at the time the alleged offence was committed, duly licensed by justices, under 6 & 7 Vict. c. 68, to have and keep open the theatre for the public performance of stage plays. The rules annexed to the licence provided that the theatre should be closed every Saturday night at half-past eleven o'clock.

The appellant also duly held an excise licence, under 5 & 6 Will. 4, c. 39, s. 7 (1), to sell intoxicating liquors by retail in the theatre.

On the evening of Saturday, January 23, 1897, the theatrical performance ended at 10.55 P.M.; but the appellant kept one of the bars of the theatre open for the sale of intoxicating liquors until 11.20 P.M.

The borough of Stockton-on-Tees is a town within the meaning of the Licensing Act, 1874.

The question for the opinion of the Court was whether, under the circumstances, the appellant was guilty of an offence against s. 9 of the Licensing Act, 1874.

*Luck*, for the appellant. Sect 9 of the Licensing Act, 1874, does not apply to this case. By s. 1, that Act and the Licensing Act, 1872 (35 & 36 Vict. c. 94), "shall, so far as is consistent with the respective tenors of such Acts, be construed as one Act." By s. 72 of the Licensing Act, 1872 (2), proprietors of

(1) 5 & 6 Will. 4, c. 39, s. 7: "It shall be lawful for the commissioners and officers of excise, and they are hereby authorized and empowered, to grant retail licences to any person to sell beer, spirits, and wine in any theatre . . . . licensed by the Lord Chamberlain or by justices of the peace, without the production by the person applying for such licence or licences of any certificate or authority for such person to keep a common inn, alehouse, or victualling house; anything in any Act or Acts to the contrary notwithstanding."

(2) The Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 72: "Nothing in this Act shall affect or apply to—

"1. The privileges at the date of the passing of this Act enjoyed by any university in England, or the respective chancellors or scholars of the same, or their successors:

"2. The privileges at the date of the passing of this Act enjoyed by the mayor or burgesses of the borough of St. Alban's in the county of Hertford, or their successors, or the exemption from the obligation to take out a licence as defined by this Act, or a licence from the Commissioners of Inland Revenue enjoyed by the

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theatres are exempted from all the provisions of the Act, and the exemption applies to the provisions of the Act of 1874. The conviction was wrong.

*Simey*, for the respondents. Sect. 72 of the Licensing Act, 1872, was only intended to apply to the special case of theatres provided for by 5 & 6 Will. 4, c. 39, s. 7. The intention was to exempt persons, who held an excise licence to sell intoxicating liquors by retail in theatres, from the necessity of obtaining a justices' licence to sell; otherwise a justices' licence would have been necessary under s. 3 of the Act of 1872. Sect. 72 applies only to the sale of drink at theatres. Sect. 24 contained an absolute prohibition against keeping open any licensed premises after closing hours. Sect. 25 made it an offence to be on any licensed premises after closing time. Those provisions, which substantially are re-enacted in ss. 3 and 9 of the Act of 1874, were not intended to be affected by s. 72. It is not contended that the theatre itself need be closed at eleven o'clock on Saturday night, but such part of the premises as is used for the sale of intoxicating liquors must be closed. [He referred to *Tassell* v. *Ovenden*. (1)]

*Luck* replied.

KENNEDY J. I have been asked by my learned brother to state my view of this question first. My view, on the whole, is that the conviction was right. We have to construe s. 72 of the Licensing Act, 1872. In that section, amongst other

company of the master, wardens, and commonalty of vintners of the city of London:

"3. The sale of spruce or black beer:

"4. The sale of intoxicating liquor by proprietors of theatres, in pursuance of the Acts in that behalf:

"5. The sale of intoxicating liquor in packet-boats, in pursuance of the Acts in that behalf:

"6. The sale of intoxicating liquor on special occasions in pursuance of the provisions in that behalf enacted:

"7. The sale of spirits in canteens, in pursuance of any Act regulating the same:

"8. The sale of medicated or methylated spirits, or spirits made up in medicine and sold by medical practitioners or chemists and druggists:

"9. The sale of intoxicating liquor by wholesale:

"10. Any penalties recoverable by or on behalf of the Commissioners of Inland Revenue, or any laws relating to the excise."

(1) (1877) 2 Q. B. D. 383.

privileges and rights which are saved, there is an exemption in respect of "the sale of intoxicating liquors by proprietors of theatres, in pursuance of the Acts in that behalf." The question for our determination is whether or not that exemption ought to be construed in its widest sense—namely, that no provision in the Licensing Acts, 1872 and 1874, is to affect in any way or apply to the sale of intoxicating liquors in theatres—or whether the operation of s. 72 ought not to be limited, as the magistrates have held, so as to exempt proprietors of theatres in respect of some, but not all, of the provisions of those Acts. I have come to the conclusion that the true effect of s. 72 is to give an exemption limited to such special rights as were given to proprietors of theatres by other Acts of Parliament in that behalf. Not so to construe the section would be, I think, to leave out of consideration the words "in pursuance of the Acts in that behalf," and to deal with the exemption as if they were omitted entirely. Similar limitations, referring to special classes of exemption, are to be found in s. 72 with respect to the sale of intoxicating liquor in packet-boats and the sale of spirits in canteens. I think that the correct view of the fourth exemption is that it exempts proprietors of theatres from the necessity of obtaining a justices' licence to sell intoxicating liquors by retail, but that it does not exempt them from the provisions of the Licensing Acts with respect to the hours of closing. If that be so, the magistrates were right in convicting here, because the bar in the theatre was kept open on the night in question for twenty minutes after the closing time—eleven o'clock—provided for by the Licensing Acts. I see no ground of public policy against my view. If s. 72 were construed as the appellant wishes, the sale of drink in theatres would be let free from any legislative interference at all, and the theatre would be left as a place where drink could be obtained at any time. The interpretation which I have put upon s. 72 appears the more just and reasonable one, and I think that the section ought to be construed in the way I have said.

WRIGHT J. I have had great difficulty in coming to a conclusion upon this question, but on the whole I think my brother

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Kennedy's solution is sufficient. The Licensing Acts, 1872 and 1874, contain a great many provisions for the regulation of the sale of intoxicating liquors, and the management of the houses in which such liquors are sold. There are, however, a number of exemptions which are specified in the Act of 1872, and those are applied by the Act of 1874, because it provides that the two Acts are to be read as one. We have here to decide what is the meaning of s. 72 of the Act of 1872, sub-s. 4. The first possible solution is that theatres are intended to be exempted altogether from the provisions of the Licensing Acts. The second is that the exemption is intended to be limited to the mere sale of intoxicating liquors in theatres. I cannot think that the exemption is intended to be absolute. The concluding words of sub-s. 4, "in pursuance of the Acts in that behalf," would have no effect if that construction were adopted. Nor do I think that the second possible meaning is the true meaning. The eighth exemption is, "the sale of medicated or methylated spirits, or spirits made up in medicine and sold by medical practitioners or chemists and druggists." Where, therefore, it is intended to deal with the mere sale only, the words "in pursuance of the Acts in that behalf" are omitted. I think that the same interpretation cannot be put upon one branch of exemption in which those words are contained, as is put upon another branch which is clearly intended to apply to the mere sale, and in which they are left out. I therefore reject both those constructions. There remains a third possible meaning —namely, that although the exemption is not absolute, and is not limited to the mere sale, yet it is an exemption limited to the express statutory provisions with respect to theatres. One of those is that proprietors of theatres may sell intoxicating liquors by retail under an excise licence; they are not required to have a justices' licence. I think that the words in sub-s. 4, "in pursuance of the Acts in that behalf," intend to limit the exemption to the particular rights which are given to proprietors by the Acts in that behalf. One effect of that is that some of the other exemptions contained in s. 72 will not be affected—at any rate the eighth exemption will not. I think that the same principle of construction would apply to the sale

of intoxicating liquors in packet-boats and canteens. I say nothing about the sale of spruce or black beer. Our decision only applies to the sale of intoxicating liquors. I am of opinion that our judgment should be for the respondents.

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*Judgment for the respondents.*

Solicitors for appellant: *Hack & Morris, for Thomas & Malkin, Stockton-on-Tees.*

Solicitors for respondents: *C. J. Archer & Parkin.*

W. A.

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[CROWN CASE RESERVED.]

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*Nov.* 13, 27.

## THE QUEEN *v.* WILLIAM JONES.

*Criminal Law—False Pretences—Obtaining Credit by Fraud—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 13, sub-s. 1.*

The defendant ordered a meal in a restaurant; he made no verbal representation at the time as to his ability to pay, nor was any question asked him with regard to it. After the meal he said that he was unable to pay, and that he had (as was the fact) only one halfpenny in his possession:—

*Held*, that he could not be convicted of the offence of obtaining goods by false pretences, but that he was liable to be convicted of obtaining credit by means of fraud within the meaning of s. 13, sub-s. 1, of the Debtors Act, 1869.

CASE stated by the recorder of Worcester, from which the following facts appeared.

The defendant was tried upon an indictment which contained two counts. The first count charged that the defendant falsely pretended to one Julia Crump that he was then able to pay her for a plate of cold meat and a pint of sherry which he then ordered and requested her to supply to him, and that he then had sufficient money to pay her for the same, by means of which false pretences he unlawfully obtained from her six ounces of mutton, three ounces of bread, and a pint of sherry with intent to defraud, &c. The second count charged that the defendant, being a person without means, incurred a debt and

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liability to William Crump amounting to four shillings in the purchase of the mutton, bread, and sherry, and that with intent to cheat William Crump, the defendant, in incurring the said debt and liability, unlawfully and fraudulently obtained from him credit for the said debt and liability by means of fraud. (1)

From the evidence it appeared that the defendant went to a restaurant kept by the prosecutor, William Crump, and ordered from his wife a plate of cold meat, some bread, and a pint of sherry, which he consumed. After the bill, which amounted to four shillings, had been presented at the end of the meal, he said that he had not got any money except one halfpenny. On being searched at the police station only one halfpenny was found upon him. The prosecutor's wife stated that generally customers paid immediately after they had finished their meal, and that she would not have supplied the defendant with the wine and food if she had known he was not able to pay for it, though customers who were known were sometimes allowed to pay afterwards. She made no inquiries of the defendant as to his ability to pay before supplying him with the food.

At the close of the case the learned recorder left each count of the indictment to the jury separately. As regards the first count, he directed them that before they could convict the defendant they must be satisfied (1.) that he intended by his conduct to represent that he was of present ability to pay for the food and drink, (2.) that he was aware of his want of ability to pay, (3.) that the wine and food were supplied by Mrs. Crump in consequence of the false pretence made by the defendant if it existed, and (4.) that there was an intention on his part to defraud. As regards the second count, he told the jury that before they could convict the defendant they must be satisfied that he was a person without means, and had in incurring a debt or liability for the articles fraudulently obtained credit from William Crump for four shillings with intent to cheat him of the same.

(1) By 32 & 33 Vict. c. 62 (the Debtors Act, 1869), s. 13, sub-s. 1, a person is to be deemed guilty of a misdemeanour "if in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud."

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The jury found the defendant guilty on both counts; and as he had been several times previously convicted and was unable to find bail he was sentenced to three months' imprisonment with hard labour on each count, the sentences to be concurrent.

The question for the opinion of the Court was whether the conviction upon both or either of the counts could be sustained.

*R. Harington*, for the defendant. The conviction was wrong. No untrue statement of any kind was made by the defendant, who merely asked for food; upon the facts it cannot be said that he was guilty of a false pretence by conduct. To support a false pretence by conduct there must be evidence of something more than a mere demand—e.g., a disguise, as in *Rex* v. *Barnard* (1), where a man, by wearing an undergraduate's cap and gown, passed himself off as a member of the university. There is nothing here which amounts to a false statement as to an existing fact.

[LORD RUSSELL of KILLOWEN C.J. Must not one have regard to the character of the business, and to the fact that customers are expected then and there to pay for goods consumed?]

Not unless such a custom is universal and is brought to the knowledge of the accused. The fair inference from the facts is that there was a promise to pay in futuro; but a pretence that a person will do at some future time that which he does not mean to do is not a criminal offence: *Rex* v. *Goodhall* (2); *Reg.* v. *Burrows*. (3) This doctrine is not affected by *Reg.* v. *Gordon*. (4)

As to the second count, no credit was in fact given, or intended to be given.

[He also cited *Reg.* v. *Cooper* (5); *Reg.* v. *Slowly* (6); *Reg.* v. *Masterson*. (7)]

*J. B. Matthews*, for the prosecution. There was ample evidence to warrant a conviction on the first count. Assuming

(1) (1837) 7 C. & P. 784.
(2) (1821) Russ. & Ry. 461.
(3) (1869) 11 Cox, 258.
(4) (1889) 23 Q. B. D. 354.
(5) (1877) 2 Q. B. D. 510.
(6) (1873) 12 Cox, 269.
(7) (1846) 2 Cox, 100.

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that the defendant made a promise to pay in futuro, such a promise may include a representation of an existing fact. There was here an implied contract, which if expressed in words would have been a contract to pay before leaving the restaurant, which involved the false representation that he had the money to pay. It was really a question for the jury whether the conduct of the defendant was such that they could fairly infer from it the representation charged in the indictment. The case is like that of giving a cheque on a bank where the drawer has no account, or an insufficient amount; that is a representation that a sufficient balance will be at the bank to meet the cheque when presented, and is a representation by conduct of the same character as that in the present case. A promise to do a thing in futuro may involve the false pretence that the promisor has the power to do that thing: *Reg.* v. *Giles.* (1) Upon the second count there is ample evidence that credit was in fact given, regard being had to the fact that the goods obtained were consumable commodities, intended for consumption on the spot.

[He also cited *Rex* v. *Jackson* (2); *Reg.* v. *Hazelton* (3); *Reg.* v. *Murphy* (4); *Rex* v. *Crossley.* (5)]

*R. Harington*, in reply.

*Cur. adv. vult.*

Nov. 27. The judgment of the Court (Lord Russell of Killowen C.J., Wright, Kennedy, Darling, and Channell JJ.) was delivered by

LORD RUSSELL of KILLOWEN C.J. This case was reserved for our consideration by the recorder of Worcester. The defendant was indicted in two counts: in the first he was charged under the Larceny Act, 1861, with obtaining goods by false pretences; in the second, with having incurred a debt and obtained credit by fraud, an offence under the Debtors Act, 1869. The facts, to which I shall presently refer, are fully set out in the case; the questions were left to the jury, and, upon

(1) (1865) L. & C. 502; 34 L. J. (M.C.) 50.
(2) (1813) 3 Camp. 370.
(3) (1874) L. R. 2 C. C. 134.
(4) (1876) 13 Cox, 298.
(5) (1837) 2 Mood. & Rob. 17.

the facts and the directions of the learned recorder, the defendant was convicted on both counts, and was then sentenced to two periods of three months' imprisonment to run concurrently. The question for us is whether, taking the facts as stated coupled with the recorder's direction to the jury, the conviction can be sustained on both counts or on either; in other words, whether there was any evidence on which the jury could properly convict the defendant.

The facts were shortly these. The prosecutor kept an eating-house, and on June 20 the defendant went in and asked for some soup; he was told that there was none ready, and thereupon asked for some cold beef; he was told that there was none, but that he could have some cold lamb and salad; and this he accordingly ordered. He then ordered half a pint of sherry, and went upstairs to have his meal; while there he rang the bell, and ordered another half pint of sherry. Subsequently he again rang the bell, and asked what there was to pay; and upon being told four shillings, said that he had no means of paying, that he had no money, and had (as was the fact) only a halfpenny upon him. Such was the state of the facts. All that the defendant did was to go into an eating-house, order food and refreshment, and eat, but not pay for it; no question was put to him, and no inquiry was made from him by the prosecutor as to his means, nor was any statement made by him whether he had means to pay. The question is whether this can be regarded as a state of things in which a jury would be justified in finding that the defendant obtained consumable articles by false pretences. We do not desire to say anything which can weaken the authority of the decisions which say that there can be a false pretence by conduct; for example, the case of *Rex* v. *Barnard* (1), where a cap and gown were used by a man who had no right to wear them, in order to convey the notion that he was a member of the university. Nor do we in any way dispute the authority of another class of cases; that is, where a man gives a cheque on a bank where he either has no account or has not sufficient means to meet the cheque, and must have known that he had not

(1) 7 C. & P. 784.

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sufficient means. In the present case the defendant did nothing beyond what I have already stated: no inquiry was made of him, and no statement was made by him. Under the circumstances, we do not think that the case could properly be left to the jury on the first count; there was no evidence that the defendant had obtained these articles by false pretences.

A further question arises: it is provided by s. 88 of the Larceny Act, 1861, that if, upon the trial of any person indicted for the misdemeanour of obtaining goods by false pretences, it is proved that he obtained them in such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanour. But in the present case the defendant did not commit larceny. In the circumstances of the case it is clear that the prosecutor parted not merely with the possession, but also with the property in his goods, and that he intended to do so, for the goods were intended for immediate consumption. The finding of the jury that the defendant was guilty of obtaining the goods by false pretences cannot therefore be supported on that ground, and the conviction on the first count is bad.

The second count is framed upon a different statute, upon s. 13 of the Debtors Act, 1869, which provides that in certain cases a person shall be deemed guilty of a misdemeanour, the first case being if in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud. There are three elements which have to be considered in the construction of that section: first, there must be the incurring of a debt or liability; secondly, there must be an obtaining of credit; and thirdly, there must be fraud: the conjunction of these three ingredients makes the offence. No one can doubt that the defendant did incur a debt or liability; he ordered goods under circumstances which implied a promise to pay for them. Then did he obtain credit? We are of opinion that he did. The prosecutor might have said that he would not furnish him with the goods until he paid the price, or he might have insisted on payment in actual exchange for each article as it was supplied, but he did neither; he furnished the goods under circumstances which passed the possession and

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property in them, relying on the readiness and ability of the defendant to pay. It does not seem to matter that the period of credit was a short period; he trusted the defendant, and parted with his goods without insisting on prepayment or upon interchangeable payment. We think, therefore, that credit was obtained. Thirdly, was there fraud? There was a debt, and there was credit, and we think there was ample evidence to justify the jury in arriving at the conclusion that the defendant was guilty of fraud. He goes to an eating-house, where the ordinary custom is to pay directly after the goods have been consumed; he knows that such goods are supplied, not on personal knowledge, but on the understanding that the ordinary custom will be observed. The jury found that he had no intention of paying; he intended to cheat, and so the jury found. We think, therefore, that the conviction was right upon the second count, and that it must be affirmed.

*Conviction quashed on first count, and affirmed on second count.*

Solicitors for prosecution: *Arrowsmith, Maund & Co., Worcester.*

Solicitor for defendant: *John Stallard, Worcester.*

W. J. B.

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## MOULT *v.* HALLIDAY.

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*Dec.* 7, 8.

*Master and Servant—Contract—Custom—Reasonableness—Notice during first Fortnight—Determination at end of first Month.*

A custom with regard to the hiring of domestic servants, to the effect that, in the absence of special contract, there is a right, on the part of either the master or the servant, to determine the service, at the end of the first calendar month, by notice given at or before the expiration of the first fortnight, is not a notorious custom of which the Courts will take judicial notice; but, where such a custom is relied on, its existence must be proved by evidence in each particular case.

Such a custom is not unreasonable; and therefore, if, in any particular case, its existence were sufficiently proved by evidence, the Court would give effect to it.

APPEAL from the Westminster County Court.

The action was brought to recover 2*l.* 6*s.* 8*d.*, alleged to be

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due to the plaintiff for a month's wages. On March 1, 1897, the plaintiff entered the service of the defendant as upper housemaid. No express agreement as to notice was made. On March 12 the plaintiff gave notice to leave the defendant's service on April 1. The defendant refused to pay the month's wages, and this action was brought to recover the amount. At the trial before the county court judge it was contended on behalf of the plaintiff that a custom existed, whereby either party to the contract of the hiring of a domestic servant was entitled, in the absence of special terms as to notice, to determine the service, at the end of the first calendar month, by notice given at or before the expiration of the first fortnight. It was further alleged that, by the custom, where a servant gives notice during the first fortnight of the service, and leaves at the end of the first month, the servant is entitled to have the character with which he or she entered the service handed over to any subsequent employer. The plaintiff and other witnesses were called in support of the alleged custom. The county court judge came to the conclusion that no such custom as alleged existed, and that the alleged custom was unreasonable, and gave judgment for the defendant, but granted leave to appeal. The plaintiff appealed.

*T. T. Paine*, for the plaintiff. The county court judge was wrong in declining to give effect to the custom relied on by the plaintiff. His view was that the familiar custom of a month's notice or a month's wages was well established, that the custom relied on by the plaintiff was inconsistent with this established custom, and was not supported by any authority, and therefore could not be acted upon; but the absence of authority does not support this view, for in the first instance a custom always requires to be proved by evidence in each case, until at last it is so well established that the Courts will take judicial notice of it. The custom of a month's notice or a month's wages grew up in this way, and in consequence there is little authority on it in the earlier reports. In *Williams* v. *Byrne* (1), Littledale J. said: "The case of a menial servant is put in illustration, but,

(1) (1837) 7 A. & E. 177, at p. 183.

even there, I do not know that we could, as matter of law, imply the power to determine the service at any time on a month's notice." The question seems then to have been treated as still open; but eight years later Parke B. said in *Turner* v. *Mason* (1): "The contract between the master and a domestic servant is a contract to serve for a year, the service to be determined by a month's warning, or by payment of a month's wages." The question appears then to have been settled. With regard to the custom now relied upon, the absence of authority may be explained by the fact that the question almost always arises in the county court. What the plaintiff here seeks to set up is in the nature of an exception to the old custom, and is, that, where nothing is said at the time of hiring, either master or servant is entitled to determine the service at the end of the first calendar month, by notice given at or before the expiration of the first fortnight. This is the custom relied on, and it is reasonable, for it is to the advantage of both parties that an early opportunity should be given to either of them of putting an end to the contract of service, if it turns out that they do not suit each other. The way in which customs grow up, and ultimately become incorporated into the common law, so that the Courts will take judicial notice of them, is explained in the notes to *Wigglesworth* v. *Dallison*. (2)

*Houghton*, for the defendant. The county court judge has found, as a matter of fact, on the evidence given before him, that the alleged usage does not in fact exist, or, at least, he has come to the conclusion that its existence was not proved to his satisfaction. This finding is conclusive against the plaintiff on the present appeal, for this Court has no jurisdiction to review the finding of the judge on a question of fact. The alleged custom is unreasonable, and is opposed to the well-established custom of a month's notice or a month's wages, which has prevailed at least ever since the beginning of the present century: *Robinson* v. *Hindman*. (3) In *Metzner* v. *Bolton* (4) Alderson B. stated the rule as follows: "When a person hires

(1) (1845) 14 M. & W. 112, at p. 116.
(2) (1779) 1 Sm. L. C. 10th ed. 528, at p. 540.
(3) (1800) 3 Esp. 235.
(4) (1854) 9 Ex. 518, at pp. 519, 520.

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a domestic servant, though nothing is said about notice, it is plain that, according to the custom of England, it is a hiring for a year, with liberty to put an end to the contract by giving a month's notice." That statement is altogether inconsistent with the plaintiff's contention. [He also referred to *Foxall* v. *International Land Credit Co.* (1)]

*T. T. Paine*, in reply. The question before the county court judge was not a question of fact. He ought, as matter of law, to have taken judicial notice of the custom: *Ex parte Powell, In re Matthews* (2); *Crawcour* v. *Salter* (3); *Ex parte Turquand, In re Parker.* (4)

HAWKINS J. I am very sorry to say that our decision in this case cannot settle the law on the question which the parties wished to have decided. The question which came before the county court judge for decision was whether or not the alleged custom had been proved, and that is a question of fact, and not a question of law. There is nothing here to shew that this alleged custom has been recognised, so as to dispense with the necessity for proving its existence. In this particular case I wish we had power to consider the evidence, and determine whether the alleged custom had really been established, but the law is that the county court judge is the sole judge on questions of fact, and therefore on this ground only we must dismiss the appeal. There was evidence before the county court judge which justified him in arriving at the conclusion that the alleged custom had not been proved.

Having heard the question as to the reasonableness of the alleged custom fully discussed in the course of the argument, I think we ought to give our opinion upon it, and I have no hesitation in saying that, in my opinion, not only would the alleged custom not be so unreasonable that it could not prevail, even if proved, but it would be so reasonable that, if it were established by evidence, it ought to be acted upon. I can see that such a custom might confer many advantages on both masters and servants; but that is not a ground on which we

(1) (1867) 16 L. T. (N.S.) 637.
(2) (1875) 1 Ch. D. 501.
(3) (1881) 18 Ch. D. 30.
(4) (1885) 14 Q. B. D. 636.

can decide this appeal. The question was discussed incidentally in the county court, of the reasonableness or unreasonableness of a custom which was suggested, of handing over the character received with a servant, who was leaving at the end of the first month, to the master or mistress into whose employment the servant afterwards entered. I think such a custom as that would be unreasonable. There is no obligation imposed upon a master or mistress to give a character to a servant, but if a character is given, it ought to be a true one. If a servant were hired with a good character from his or her last place, and it afterwards came to the knowledge of the master or mistress that such character was undeserved, it would be dishonest, with such knowledge, to pass on the good character to a subsequent employer. I think therefore that such a custom would be bad. On the ground which I have already stated, this appeal must be dismissed.

CHANNELL J. I am entirely of the same opinion. I agree with everything that has been said in the judgment which has just been delivered, and I should not have considered it necessary to add anything, were it not that the case raises a question of some interest as matter of law. It depends on what is the nature of that thing which is called a custom. A custom is what is so well known and understood that in transacting business it is unnecessary to mention it, because it is so well known that it must be taken to be incorporated in every contract, unless something to the contrary is said. For instance, there is the custom of a month's notice or a month's wages, which is so well known that every person who is hired as a domestic servant is taken to be engaged on those terms, unless there is an express stipulation to the contrary. The question as to the existence of a custom is a question of fact, and it is necessary to prove the custom in each case, until eventually it becomes so well understood that the Courts take judicial notice of it. The cases cited by Mr. Paine in reply illustrate this; though they were not cases of contract, but turned on reputed ownership, the principle is really the same. The question as to the custom is a question of fact; but, having regard to the

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difficulty of the case, I think we ought to give our opinion as to the law. The case is important, for one ground relied on by the county court judge is, that the alleged custom is inconsistent with the well-known custom of a month's notice or a month's wages. I do not agree with that view, for, when once it is admitted that there is a custom, it becomes clear that the custom must have grown up, and it follows that the custom may change, and a new custom may become notorious, so as to be incorporated into every contract, unless it is expressly excluded. Then there comes a further stage, where the custom need no longer be proved, but the Courts will take judicial notice of it. In the present case the custom certainly has not got to the stage of being judicially noticed, but the Court must in each case have evidence of the custom, and must form an opinion on that evidence. Here the county court judge has formed an opinion, and we cannot review his finding. I think the alleged custom, if it were proved, would be reasonable, and certainly it would not be so unreasonable that it could not be acted upon. There can be very few cases, where a custom has been sufficiently proved, in which a Court could hold that it was unreasonable, for that it must be convenient is shewn by the fact that it has been established and followed. I think the custom alleged in the present case, that there is a right on the part of either the master or the servant, though nothing has been said at the time of the hiring, that is, in the absence of special contract, to determine the service at the end of the first calendar month, by notice given at or before the expiration of the first fortnight, if it were sufficiently proved, could be given effect to, and is not inconsistent with the well-known custom of a month's notice or a month's wages. As to the suggested custom of handing on the servant's character to the subsequent employer, I agree that any such custom would be unreasonable.

*Appeal dismissed.*

Solicitors for plaintiff: *Dod, Longstaffe, Son & Fenwick.*
Solicitors for defendant: *Budd, Johnsons & Jecks.*

P. B. H.

[IN THE COURT OF APPEAL.]

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*July* 23;
*Oct.* 26;
*Nov.* 9.

## *In re* PALMER & CO. AND HOSKEN & CO.

*Arbitration—Statement of Special Case—Right to apply to Court—Reconsideration of Award—Setting aside Award—Duty of Arbitrator—Misconduct—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *ss.* 10, 11, 19.

Sect. 19 of the Arbitration Act, 1889, impliedly confers on a party to an arbitration the right, at any stage of the proceedings, to apply to the Court for an order directing the arbitrator to state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

If a party to an arbitration, acting bonâ fide, requests the arbitrator on reasonable grounds either to state a special case for the opinion of the Court upon some questions so arising and material for consideration, or to delay his award until the party can himself apply to the Court for an order directing a special case, and the arbitrator refuses to comply with the request, or by summarily making his award attempts to preclude the party from applying, the arbitrator is primâ facie guilty of a breach of duty towards that party. But if the application is frivolous and made merely for the purpose of delay, the arbitrator will be right in refusing it, and will be upheld by the Court if he does so.

A breach of duty of this character is primâ facie misconduct on the part of an arbitrator within the meaning of s. 11 of the Act of 1889, and justifies the Court, even after an award has been completed, in setting it aside under s. 11, sub-s. 2, or in remitting it for reconsideration under s. 10, sub-s. 1.

This view of the law is consistent with *Dinn* v. *Blake*, (1875) L. R. 10 C. P. 388, and *In re Keighley, Maxsted & Co. and Durant & Co.*, [1893] 1 Q. B. 405.

In this case, on the ground of misconduct of that character by the arbitrators, a completed award was remitted to them with a direction that they should reconsider it, and state whether there was a deficiency in the quantity of a cargo of wheat delivered at a port of discharge, and, if there was, then to state a special case.

APPEAL by leave from an order made by Day J. in chambers referring back an award to the arbitrators, and ordering them to state in the form of a special case a question of law.

Under a contract in the form adopted by the Liverpool Corn Trade Association, Limited, and dated February 3, 1897, Palmer & Co. bought through their brokers from Hosken & Co. a cargo of Californian wheat shipped at San Francisco per the

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ship *Port Douglas*, at the price of 33*s.* per 500 lbs. gross, including freight and insurance. The contract contained provisions (inter alia) that the ship was, on arrival, to discharge according to the custom of the port of discharge; that the cargo was to be shipped in bags which were to be weighed and paid for as wheat; that any deficiency on bill-of-lading weight was to be paid for by seller, and any excess over bill-of-lading weight was to be paid for by buyer; that a weigher should be appointed by the seller unless contrary to the official regulations at the port of discharge; and that the wheat should be weighed in drafts of not less than five bags, or not less than 5 cwt. per draft, or, at buyer's option, ex ship at even weights of not less than 250 lbs. per draft. The contract also contained clauses providing that all disputes arising out of the contract should be referred, according to the Liverpool arbitration rule, to two arbitrators, who were to be members of the Liverpool Corn Trade Association, and that in case either party should be dissatisfied with any award a right of appeal should lie to the directors of the association.

There had been intermediate sales of the cargo, but Messrs. Palmer & Co. were the last buyers; and in the same month of February they, in accordance with the terms of the contract, paid Messrs. Hosken & Co. the sum of 16,508*l.* 11*s.* 10*d.*, which was the amount of the provisional invoice for the cargo, and was based upon the cargo containing the number of bags of wheat and the weight in pounds stated in the bill of lading. The ship arrived at Galway, and, according to their evidence, Messrs. Palmer & Co. assented to the suggestion of the superintendent of the shippers, and allowed the cargo to be weighed at an even weight of 240 lbs. per draft. This rendered it necessary to cut the bags and empty the wheat into the hold of the ship, and then to weigh the wheat and bags on the deck of the ship, an operation which is known as "skipping in the hold."

Delivery having been taken in this way, according to the contention of Messrs. Palmer & Co., the result was that they received 1780 bags short, the money value of which was 442*l.*, and they claimed the right to recover back from the sellers that

sum. This was resisted by the sellers, and the dispute between them was referred to two arbitrators and a third arbitrator chosen by those two, in accordance with the contract and the rules of the Liverpool Corn Trade Association. On May 29, 1897, the arbitrators awarded that the buyers had no claim upon the sellers for deficiency in invoice quantity.

The matter was brought before the directors of the Liverpool Corn Trade Association, by way of appeal against the award, on June 16, 1897. According to the evidence a full discussion took place, during which the representative of Messrs. Palmer & Co. stated to the directors that the case was of great importance to the trade, and produced counsel's opinion on it; and made formal application to them to state a special case for the opinion of the High Court of Justice under the 19th section of the Arbitration Act, 1889, upon the point of law whether Messrs. Palmer & Co. were entitled to be refunded by Messrs. Hosken & Co. in respect of the actual deficiency below the bill of lading quantity notwithstanding the cargo was "skipped" in the hold and rebagged at even weights of less than 250 lbs. per draft. In the event of their refusing to state a case, the directors were asked to adjourn the further consideration of the matter in order that Palmer & Co. might apply to the Court for an order that the point of law might be settled.

On the same day the directors, without giving any decision upon the applications for a special case or for adjournment, passed a resolution that the award of the arbitrators should be confirmed.

Their reasons for taking this course were subsequently given in an affidavit made by their chairman as follows: "After careful consideration of the appeal, and of the application to state a case for the opinion of the Court, and of the reasons for such application, I and my co-directors were of opinion that the award of the arbitrators should be confirmed, that we were competent to deal with the case, and that there were no grounds or necessity for seeking the assistance of the Court."

Messrs. Palmer & Co. then took out a summons in the matter of the Arbitration Act, 1889, against the directors, asking that their award of June 16, 1897, should be remitted

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to them for reconsideration, and that they might be ordered to state, in the form of a special case for the opinion of the Court, the question of law above stated.

This summons came before Day J. in chambers on July 23, when the learned judge made an order in the terms of the application.

Messrs. Hosken & Co. appealed under leave given for the purpose. (1)

*Edward Bray* (with him *Reginald M. Bray*), for the appellants. This is an application to the Court that an award may be remitted to the reconsideration of the arbitrators, and that they may be ordered to state in the form of a special case a question of law arising in the course of the reference. But the power of directing the statement of a special case conferred upon the Court by s. 19 of the Arbitration Act, 1889, can, as was held in *Tabernacle Permanent Building Society* v. *Knight* (2), only be exercised during the proceedings under the reference; and in this case the award has been completed, and the proceedings are at an end.

The only other sections of the Arbitration Act, 1889, on which the application can be founded are s. 10 or s. 11. Sect. 10 corresponds with s. 8 of the Common Law Procedure Act, 1854, and, according to the authorities on those two sections, the power given by the Legislature to the Court to remit an award to the reconsideration of the arbitrators or umpire, is only exercisable

(1) The material sections of the Arbitration Act, 1889, are as follows:—

Sect. 10: "(1.) In all cases of reference to arbitration the Court or a judge may from time to time remit the matters referred, or any of them to the reconsideration of the arbitrators or umpire. (2.) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order."

Sect. 11: "(1.) Where an arbitrator or umpire has misconducted himself the Court may remove him. (2.) Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside."

Sect. 19: "Any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference."

(2) [1892] A. C. 298, 302.

on certain specific grounds. These are—(1.) where the arbitrator himself alleges or is satisfied that he has made a mistake either of law or of fact, and both he and the party approach the Court; (2.) where it appears that since the making of the award material evidence has been discovered; (3) where there has been corruption or fraud; and (4.) where there is a mistake of law or fact apparent on the face of the award.

None of these grounds exist in the present case; and an award will not be remitted merely on the ground that the arbitrator has made a mistake of law or of fact; for the parties have chosen their arbitrator for better or worse: *In re Keighley, Maxsted & Co. and Durant & Co.* (1); *Dinn* v. *Blake.* (2) Here there was evidence before the arbitrator that the full quantity of cargo stated in the bill of lading on which the provisional invoice was founded was duly shipped, and probably the arbitrators were not satisfied that there was in fact any deficiency in the delivery.

*Carver*, for the respondents. The contention for the appellants is that the Court had no jurisdiction to make this order. But there are numerous cases in which after an award has been delivered an order to remit it for reconsideration has been made, although there has been no allegation of fraud or of misconduct on the part of the arbitrator. Instances of this are—*In re Gough and the Mayor of Liverpool* (3), and *In re Kirkleatham Local Board.* (4)

In this case, however, there has been misconduct on the part of the arbitrators, for they made their award in a summary manner on purpose to preclude Messrs. Palmer from raising the point of law which they wished to have decided.

The Arbitration Act, 1889, introduced new principles, and invested the Court with powers of control over arbitrators which it did not previously possess, so that the cases decided before the Act do not supply a complete guide with regard to proceedings under it. If an arbitrator were able, by declining to express an opinion upon a point of law and hurriedly making his award, to prevent an order being made upon him to state a

(1) [1893] 1 Q. B. 405, 409.
(2) L. R. 10 C. P. 388.
(3) Annual Practice, 1898, p. 188.
(4) [1893] 1 Q. B. 375.

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case, the intention of the Legislature would be defeated, and s. 19 would be made nugatory and of no effect. This was pointed out by Lord Esher M.R. and Lopes L.J. in *In re Spillers and Baker.* (1) Again, while it is clear that remission orders may be made under s. 10 after award, "the proceedings under a reference" referred to in s. 19 are not altogether at an end when the award has been made, because such proceedings may comprise the enforcement of the award. Moreover, the learned judge of the Court below has exercised what is a discretionary power, and the Court will not interfere with an order made in the exercise of his discretion.

*E. Bray*, in reply.

*Cur. adv. vult.*

Nov. 9. LINDLEY M.R. (after stating the facts of the case). Now, the reasons given by the chairman of the directors for their refusal not only to state a case to enable Messrs. Palmer to raise the question of law, but also to adjourn for the purpose of applying to the Court, are consistent with more views than one. It may be that the directors came to the conclusion that there was no deficiency in the cargo; or, in other words, that they were not satisfied that there had been any overpayment. In opposition to that view, Messrs. Palmer produced evidence to the effect that the deficiency was not in controversy; and in fact that everybody admitted it. The reasons for the refusal are also consistent with the view that there was a deficiency, but that in point of law, in consequence of the course taken by Messrs. Palmer in taking delivery at even drafts of 240 lbs., they could not make any claim; and that is the view which Messrs. Palmer say has prevailed with the directors, and is wrong in point of law, having regard to the option given to them by their contract with their seller.

Then the question arises as to the jurisdiction of the Court to make the order. That turns upon three sections of the Arbitration Act, 1889—namely, ss. 10, 11, and 19. [The Master of the Rolls then read these sections, and continued:—] Those are the sections which are material. The Arbitration Act, 1889,

(1) [1897] 1 Q. B. 312.

s. 19, gives the Court very extensive powers over arbitrators beyond any which the Court previously possessed. It impliedly confers on the parties to an arbitration the right to apply to the Court for an order directing the arbitrator to state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference. The right thus conferred must be respected by the arbitrator; and if a party to an arbitration, acting bonâ fide, requests an arbitrator either to state a special case raising a question of law arising in the course of the reference and material for consideration, or to delay his award until the party can apply to the Court for an order directing a special case, and the arbitrator refuses to comply with either of such requests, the arbitrator is primâ facie at all events guilty of a breach of duty towards such party.

Such a breach of duty is primâ facie misconduct on the part of the arbitrator within the meaning of s. 11 of the statute, and justifies the Court in setting aside the award under that section, or in remitting it for further consideration under s. 10. Even in such a case as that supposed there may possibly be some grounds for justifying the refusal of the arbitrator, although it is not easy to imagine any. But it is obvious that, if an application for a special case or for an adjournment is frivolous and is made merely for delay, an arbitrator will be perfectly right to refuse it, and will be upheld by the Court in so doing.

This view of the law is quite consistent with *Dinn* v. *Blake* (1) and *In re Keighley, Maxsted & Co. and Durant & Co.* (2) Sect. 19 has imposed new duties on arbitrators, and has consequently made a breach of such duties by them misconduct on their part; although before such duties existed their conduct could not be so regarded. In the present case the question of law raised by the buyer is material if there is a deficiency; and the question is clearly raised bonâ fide and not at all for delay. On the evidence before us a considerable deficiency seems established; but the parties are not agreed about the matter, and the Court does not know what the arbitrators'

(1) L. R. 10 C. P. 388. (2) [1893] 1 Q. B. 405.

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decision on this question really is. If they find there is no deficiency, no question of law arises; but if there is a deficiency, the question of law raised by the buyer becomes all important. Under these circumstances the order appealed from should be slightly varied in its terms, so as to direct the arbitrators to reconsider their award and to state whether there is a deficiency or not, and if there is then to state the special case. In substance, however, the order is right, and the appeal must be dismissed.

CHITTY L.J. The order under appeal cannot be supported under s. 19 of the Arbitration Act, 1889, standing alone. The proceedings were closed by the award. Sect. 19 empowers the arbitrator to state a case "at any stage of the proceedings," but not after the award has been completed, and the power of the Court or a judge to compel him to state a case, under that section standing alone, is on the construction of the section limited in like manner. This was the opinion of the Lords by whom the *Tabernacle Case* (1) was decided.

The case, then, turns on s. 10, read in connection with the other sections of the Act, including particularly ss. 11 and 19. Upon the principle of construction adopted in *In re Keighley, Maxsted & Co. and Durant & Co.* (2) the Court or a judge has power to remit an award to the arbitrator for reconsideration where there has been misconduct on the part of the arbitrator. Now, on the facts of this case I think that it was the duty of the directors to adjourn in order to give Palmer & Co. an opportunity to apply to the Court or a judge for an order directing a special case to be stated for the purpose of raising the question of law. The application was made in good faith and on reasonable grounds; it was not made for the purpose of delay. According to the affidavits, a strong case was made out in the evidence adduced before the directors by Palmer & Co., the ultimate buyers, shewing that on the discharge of the cargo from the ship there was a deficiency in the quantity stated in the provisional invoice, which was founded on the bill of lading; and if there was, in fact, a deficiency, the contract

(1) [1892] A. C. 298. (2) [1893] 1 Q. B. 405.

between the ultimate sellers and buyers gave a right to the buyers to have the deficiency refunded; and the right to have the deficiency refunded was irrespective of any question of the liability of the ship. I am not stating these propositions for the purpose of deciding any point of law between the parties, but merely for the purpose of shewing the nature of the case presented on Palmer & Co.'s behalf to the directors. The points of law, if they arise on the facts, will have to be considered and decided hereafter.

Now, the appellants do not contest that the evidence as to deficiency on the discharge was such as is stated in Palmer's affidavit; wholly passing this evidence by, they state that there was evidence before the arbitrators of a due shipment of the full quantity of cargo referred to in the bill of lading, and they suggest that the arbitrators were not satisfied in fact that any deficiency in the outturn was proved. The chairman of the directors has made an affidavit; but it is silent on this point of fact. We are unable to say whether the directors were prepared to find as a fact that there was no deficiency. The order which we propose to make varying the order in chambers will leave that matter open for the decision of the directors. If they find as a fact that there was no deficiency, the point of law sought to be raised will not arise.

Our decision is quite consistent in principle with that of Lord Esher and the other members of the Court in *In re Keighley, Maxsted & Co. and Durant & Co.* (1) There, in dealing with the 10th section of the Arbitration Act, 1889, the Court referred to the corresponding 8th section of the Common Law Procedure Act, 1854, and the previous decisions on that section. But they had not to take into their consideration the new enactment of the 19th section of the Arbitration Act, 1889, and the general effect of that enactment on arbitrations, and on the application of the 10th section to circumstances such as those before us. It seems to me that the Legislature intended to confer on the Court or a judge a discretionary power to be exercised according to the circumstances of the case over arbitrators in reference to questions of law at least to this extent

(1) [1893] 1 Q. B. 405.

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—namely, that when a request for a case is made in good faith, and on reasonable grounds, and the request is made for an adjournment for the purpose of applying to the Court or a judge, the arbitrator by summarily making his award ought not to preclude, or attempt to preclude, the party from applying to the Court.

In this case I think that the adjournment ought to have been allowed; that there was a duty cast on the directors which they failed to perform; and that in this sense there was misconduct on their part which justifies us in remitting the case to them in the manner already stated by the Master of the Rolls. In the *East and West India Docks Case* (1), decided before the Arbitration Act, 1889, was passed, it was held by the House of Lords that the Court had jurisdiction to give leave to revoke the submission if there was reasonable ground for supposing that the arbitrator was going wrong in point of law, even in a matter within his jurisdiction. The leave would have been given in the circumstances of that case if the parties had not come to terms that the arbitrator should state a special case for the decision of the Court. This jurisdiction, as was held in *James* v. *James* (2), is discretionary, and to be exercised according to the circumstances of the case. In the *East and West India Docks Case* (1) the discretion was exercised while the arbitration was still pending, and consequently the decision does not directly bear on the present case. Granting leave to revoke the submission is a strong measure and a drastic remedy. As the law then stood, it was considered the right mode of controlling the arbitrator in matters of law; and the case shews the importance attached by the House of Lords to keeping the arbitrator right in point of law; and in this respect it has an indirect bearing on the present case.

*Appeal dismissed*

Solicitors: *Tilleards; Simpson & Cullingford.*

(1) (1887) 12 App. Cas. 738. (2) (1889) 23 Q. B. D. 12.

W. W. K

## THE CORPORATION OF THE BOROUGH OF THETFORD *v.* THE NORFOLK COUNTY COUNCIL.

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*Oct.* 26;
*Nov.* 12.

*Local Government—County Council—Borough having Population under* 10,000 *—Separate Court of Quarter Sessions—Liability for Costs of—Municipal Corporations Act*, 1882 (45 *&* 46 *Vict. c.* 50), *s.* 169—*Local Government Act*, 1888 (51 *&* 52 *Vict. c.* 41), *s.* 38.

In the case of boroughs having a separate court of quarter sessions and containing a population of less than 10,000 the Local Government Act, 1888, has not transferred the obligation of paying the salaries of the recorders and clerks of the peace of such courts of quarter sessions from the borough to the county council.

*Ex parte County Council of Kent and Council of Sandwich*, [1891] 1 Q. B. 389, not followed.

TRIAL before Wills J. without a jury.

The borough of Thetford is a municipal borough incorporated by charter in the year 1573. It is situate partly in Norfolk and partly in Suffolk, but for the purposes of administration and government is deemed to be situate wholly within the county of Norfolk. It contains a population of less than 10,000 persons. It has had since 1839, and still has, a separate court of quarter sessions, presided over by a recorder who is paid a salary of 40*l.* a year. This salary was previously to the passing of the Local Government Act, 1888, and has since that date been paid by the plaintiffs out of the borough fund. In connection with the court of quarter sessions there is a clerk of the peace who is paid for his services by fees. Previously to the said Act these fees were paid by the plaintiffs out of the borough fund. Since the passing of that Act the defendants have paid to the clerk of the peace the fees payable to him by prosecutors at the quarter sessions, but all other fees payable to him for his services continue to be paid out of the borough fund. The borough has also a separate court of petty sessions. The clerk to the borough justices is paid a salary of 84*l.* 9*s.* 8*d.* for his services in connection with such court, and also a further allowance of 2*l.* 2*s.* per annum for his services as clerk to the visitors and magistrates under the Lunacy Act, 1890. The said

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courts of quarter and petty sessions are held at the Guildhall of the borough, and the plaintiffs have paid the expenses incurred by reason of the necessary attendance and the warming, cleaning, and lighting of the Guildhall. The plaintiffs contended that, since the passing of the Local Government Act, 1888, the liability for the costs and expenses of the quarter and petty sessions, including the salary of the recorder, the fees of the clerk of the peace, the salary of the clerk to the borough justices, and the expenses in connection with the Guildhall, lay upon the defendants, and they claimed a declaration to that effect. They also claimed to be reimbursed the amount of the said expenses which they had borne since the passing of the Act.

*Crump*, *Q.C.*, and *Rufus Isaacs*, for the plaintiffs. The effect of the Local Government Act, 1888 (1), is to transfer the

(1) By the Local Government Act, 1888, s. 35, "In the case of a quarter sessions borough, not being one of the boroughs named in the third schedule to this Act, but containing, according to the census of 1881, a population of ten thousand or upwards, the following provisions shall . . . . apply:"

Sub-s. 5: "The payment of the costs of assizes and sessions shall be a general county purpose for which the parishes in the borough may be assessed to county contributions, and all costs of prosecutions mentioned in s. 169 of the Municipal Corporations Act, 1882, shall be paid out of the county fund."

Sect. 38: "Where a borough having a separate court of quarter sessions contained according to the census of 1881 a population of less than ten thousand the following provisions shall . . . . apply:"

Sub-s. 5: "The area of the borough shall for . . . . all . . . . administrative purposes of the county council be included in the county as if the borough had not a separate court of quarter sessions, . . . and the parishes in the borough shall be liable to be assessed to all county contributions."

Sect. 100: "The costs of assizes and of quarter and petty sessions include such of the following costs as are applicable, that is to say, the costs of maintaining and providing the courts and offices and the judges' lodgings, the salaries and remuneration of a chairman of quarter sessions, clerks of assize, clerks of the peace, clerks of the justices, and other officers, the costs of the jury lists, the costs of rewards ordered to be paid by the court, the costs of prosecutions, including the costs of the defendant's witnesses, and all other costs incidental to the assizes, quarter sessions, petty sessions, or the judges, but nothing shall require a quarter sessions borough to contribute towards the costs of prosecutions at assizes except in the case of prisoners committed for trial from the borough."

By s. 169 of the Municipal Corporations Act, 1882, "A municipal corporation of a borough having a separate court of quarter sessions shall be

cost of the administration of justice at the borough quarter and petty sessions from the borough to the county council.

By s. 35, sub-s. 5, "The payment of the costs of . . . . sessions shall be a general county purpose for which the parishes in the borough may be assessed to county contributions." By s. 68 the expression "general county purposes" means "all purposes for contributions to which the county council are for the time being authorized by law to assess the whole area of their administrative county." Those two sections when read together shew that it was intended to transfer the costs of borough sessions to the county rates. And by s. 100 the costs of sessions include "the costs of maintaining and providing the courts and offices, . . . . the salaries and remuneration of a chairman of quarter sessions . . . . clerks of the peace, clerks of the justices, and other officers." Therefore the expense of the salaries of the recorder, the clerk of the peace, and the clerk of the justices, and the expenses in connection with the court-house, are thrown by s. 35, sub-s. 5, on the county fund. It is true that that sub-section occurs in a section which is in terms limited in its application to boroughs having a population of over 10,000. But it must be treated as applying a fortiori to boroughs having a less population. For otherwise the smaller and poorer boroughs would be exposed to the hardship of having to pay the costs of their own borough quarter sessions, and also to contribute to the costs of the county sessions; whereas the boroughs with a population of over 10,000 are exempted from contribution to the expenses of the county sessions. And this was the view taken by the Divisional Court in *Ex parte County Council of Kent and Council of Sandwich*. (1) It was there laid down that "quarter sessions boroughs with a population of less than 10,000 . . . . have neither the duty nor the power to raise the expenses of sessions by rates, such expenses being a general county purpose: s. 35,

liable to pay the costs and expenses attending the prosecution of any felony committed or supposed to have been committed in the borough, and of any other offence committed or supposed to have been committed in the borough the costs and expenses attending the prosecution whereof are by law payable as in the case of a felony."

(1) [1891] 1 Q. B. 389.

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sub-s. 5, of the Local Government Act, 1888." And the question whether "the power and duty of paying the expenses of the court of quarter sessions of Sandwich (a borough with a population of less than 10,000) and the salaries and remuneration of the recorder and clerk of the peace of the borough and liberties" were transferred to the county council of Kent was answered by the Court in the affirmative. As to the salary of the clerk to the borough justices, that also is covered by authority. It was held in *In re County Council of Herefordshire* (1) that the liability to pay his salary is by s. 84 thrown on the county. As to the claim for reimbursement of past payments, such payments were not made voluntarily but under practical compulsion, for it was absolutely necessary that the administration of justice should be carried on.

*Channell, Q.C.*, and *W. Wills*, for the defendants. Before the Municipal Corporations Act, 1835, the law as to the liability of boroughs to pay for the administration of justice depended mainly on their charters. Some of the charters contained a non-intromittant clause—that is to say, a clause excluding the borough from the jurisdiction of the county justices, the effect of which was that no county rate could be levied in the borough. Under the Municipal Corporations Act, 1835, all quarter sessions boroughs were placed in the same position as boroughs before that Act having a non-intromittant clause in their charter. The result was that quarter sessions boroughs paid the whole cost of their own administration of justice, and no part of that of the county. Under the Municipal Corporations Act, 1882, these boroughs were required to pay part of the expenses of prosecutions at the assizes (ss. 151, 169), not by direct county rating, but by a contribution raised by the boroughs themselves upon precept. Then came the Local Government Act, 1888, by which quarter sessions boroughs were divided into three classes. First, the large boroughs mentioned in Sched. III., which are called county boroughs. They are practically made separate counties in themselves. Their pecuniary position is substantially unaltered: they continue to bear the costs of their own courts, and to contribute to the costs of prosecutions

(1) [1895] 1 Q. B. 43.

at the assizes of prisoners committed for trial from the borough.

Second, boroughs with a population over 10,000. Their position is regulated by s. 35. In their case the machinery of contribution is done away with, and such boroughs are now required to pay towards the costs of prosecutions at assizes and county sessions, which payment is levied by means of a direct county rate. In return for this the county bears its share of the costs of prosecutions at the borough courts, s. 169 of the Municipal Corporations Act, 1882, being, so far as relates to this class of boroughs, repealed. The cost of prosecutions at the assizes, county sessions, and borough sessions are all lumped together and paid for by the county, of which for this purpose the borough forms part. But the Act does not affect the liability of these boroughs to maintain their own courts, and pay their recorder and clerk of the peace. The word "sessions" in sub-s. 5 of s. 35 must be understood as limited to "county sessions." This seems clear from s. 100, which, in defining what the "costs of sessions" include, does not mention the salary of a recorder. The words at the end of that paragraph, "nothing shall require a quarter sessions borough to contribute towards the costs of prosecutions at assizes except in the case of prisoners committed for trial from the borough," must be read as referring to county boroughs alone; otherwise it would be inconsistent with s. 35, sub-s. 5.

Third, boroughs under 10,000. The section relating to them—s. 38—does not in any way alter the burden of the administration of justice in the borough. It does not even repeal, quoad these boroughs, s. 169 of the Act of 1882. Still less does it take away from the boroughs the cost of the recorder's salary, or of that of the clerk of the peace. At the same time it, by sub-s. 5, makes the area of the borough part of the county for the administrative purposes of the county council, and the "parishes in the borough shall be liable to be assessed to all county contributions." The result is that these boroughs have to pay their proportion of all expenses of the administration of justice in the county, and the whole expense of such administration in the borough. If this be thought a

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hardship, the remedy is in the borough's own hands to petition under sub-s. 7 of s. 38 for a revocation of the grant of a court of quarter sessions. Parliament probably did not think these small jurisdictions worth preserving, but instead of extinguishing them left it to the boroughs to do so themselves if they thought fit. The Court in the *Sandwich Case* (1) not only interpreted s. 35, sub-s. 5, wrongly, but further made the mistake of applying it to this class of boroughs. They seem to have thought that the sub-section occurred in s. 38. That decision is not binding: the jurisdiction of the Court was consultative only, the questions for decision having been submitted to them under s. 29. The same observation applies to the case of *In re County Council of Herefordshire*. (2) Sect. 84 applies to the salaries of clerks of "petty sessional divisions" only, and a borough is not a petty sessional division. The salary of such clerk is still payable by the borough, as also is the salary of the clerk to the visitors of lunatics. Sect. 178 of the Lunacy Act, 1890, puts that expense in the case of licensed houses within a borough upon the borough fund.

*Crump, Q.C.*, in reply.

*Cur. adv. vult.*

Nov. 12. WILLS J. This case raises the questions whether the salary of the recorder of Thetford, the fees of the clerk of the peace of Thetford, and the salaries of the clerk to the borough justices of Thetford, and of the clerk to the visitors of lunatics in the borough, should be paid by the borough of Thetford or by the county council of Norfolk.

The answers to these questions, of course, depend entirely upon the legislation contained in the Local Government Act, 1888. The main object of that Act was to transfer the administrative business of justices in quarter sessions to the county council, and for that purpose it necessarily dealt with the financial relations to be established between quarter sessions boroughs situate within the area of the county and the county council. For the purpose of dealing with those relations, the Act divides such boroughs into three classes. The first class

(1) [1891] 1 Q. B. 389. (2) [1895] 1 Q. B. 43.

consists of those large and important boroughs specified in the third schedule to the Act, and which are called county boroughs. They are substantially put upon the same footing as the counties themselves for most of the purposes of local administration, and there is no doubt that in their case the salary of the recorder and the remuneration of the clerk of the peace are to be paid out of the borough fund. The second class consists of quarter sessions boroughs having a population of not less than 10,000. And with regard to these boroughs, s. 35, sub-s. 5 provides that "the payment of the costs of . . . . sessions shall be a general county purpose for which the parishes in the borough may be assessed to county contributions, and all costs of prosecutions mentioned in s. 169 of the Municipal Corporations Act, 1882" —that is to say, prosecutions for offences committed within the borough—"shall be paid out of the county fund." The word "sessions" in that sub-section must be read as including borough sessions as well as county sessions, and the effect is to throw the whole costs of the administration of justice in the borough, including the payment of the salary of the recorder and the remuneration of the clerk of the peace, upon the county fund. The third class consists of quarter sessions boroughs having a population of less than 10,000, in which class comes the borough of Thetford. In these boroughs it seems clear that up to the passing of the Act of 1888 the salary of the recorder and the remuneration of the clerk of the peace were paid by the borough, and they must continue to be paid for by the borough unless there is something in the Act which alters the incidence of the expense and transfers it to the county council. The only section which there could be any pretence for invoking to shew that the expense had been so transferred is s. 38, for that is the only section relating to boroughs with a population of under 10,000. But I can see nothing in that section to suggest such a transfer. It contains no provision analogous to sub-s. 5 of s. 35. Therefore I cannot avoid the conclusion that Parliament intended in the case of these smaller boroughs to leave the incidence of the expense where it was. It is said that this involves a hardship, because, while there is no provision for casting any part of the costs of the administration

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of justice within the borough upon the county council, the borough ratepayers have equally with those of the rest of the county to contribute to the salaries of the officers of the county sessions. If it is a hardship, it is one which the Legislature has chosen to create. What its object in creating it may have been is immaterial; though possibly the explanation may be that suggested by Mr. Channell, that where there was a very small population, and a small jurisdiction which the borough could get rid of if it chose by petitioning Her Majesty to revoke the grant of a separate court of quarter sessions, Parliament may have thought the retention of the jurisdiction a luxury which those desiring to retain it might very well be called upon to pay for.

Apart, then, from authority, the determination of this question as to the liability for the salary of the recorder and the remuneration of the clerk of the peace of such a borough as Thetford seems clear enough. In the case of *Ex parte County Council of Kent and Council of Sandwich* (1), the Divisional Court, indeed, held the contrary. But it seems to be admitted that that case was not thoroughly argued, and, what is still more important, the judgment of the Court seems to have been founded to a great extent upon the mistaken supposition that sub-s. 5 of s. 35 is to be found in s. 38 instead of in s. 35, or in both of them.

Under those circumstances, I cannot treat that case as binding upon me.

The next question is as to the liability for the salary of the clerk of the borough justices in petty sessions. That has been already decided in *In re County Council of Herefordshire* (2), where the Divisional Court held that s. 84 imposed the duty of paying the salary of such clerk upon the county council. In that opinion I entirely concur.

Then as to the salary of the clerk to the justices acting as visitors of houses licensed for the reception of lunatics within the borough. It seems to me that on this point it is not necessary to consider the provisions of the Local Government Act, because the matter is provided for by s. 178 of the Lunacy Act, 1890

(1) [1891] 1 Q. B. 389. (2) [1895] 1 Q. B. 43.

(53 & 54 Vict. c. 5), which seems to throw the cost of such salary upon the borough.

The last matter with which I have to deal is the claim for arrears of salary which have been paid by the borough when the county council ought to have paid them; and this, having regard to my judgment, is confined to the salary of the clerk of the borough justices. It is said that the borough was under no legal liability to pay, and therefore the payment was voluntary. But it seems to me that it could not possibly allow its petty sessional business to go on without a clerk; and therefore I think that under the circumstances it paid under a kind of duress which justified it in calling upon the county council to repay it. But it cannot recover more than, having regard to the terms of s. 68, sub-s. 9, of the Local Government Act, a county rate might have been made for at the date of action brought.

My judgment, therefore, will be a declaration that, so far as the salary of the recorder, the remuneration of the clerk of the peace, and the salary of the clerk to the visiting justices are concerned, the borough of Thetford is liable, and that as regards the salary of the clerk to the borough justices the county council is liable; and I further give judgment against the defendants for so much of the arrears of this last-mentioned salary as I have above indicated.

*Judgment accordingly.*

Solicitors for plaintiffs: *Ford, Lloyd, Bartlett & Michelmore, for J. Houchen, Thetford.*

Solicitors for defendants: *Sharpe, Parker & Co., for C. Foster, Norwich.*

J. F. C.

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*Nov.* 3, 22.

[IN THE COURT OF APPEAL.]

## DIEDERICHSEN *v.* FARQUHARSON BROTHERS.

*Ship—Bill of Lading—Incorporation of Conditions of Charterparty—"Freight and all other Conditions as per Charterparty"—Limitation to Conditions to be performed by Consignee.*

By a charterparty a vessel was to load a full cargo of timber, including a deck cargo at merchant's risk. Timber was loaded under a bill of lading which contained no reference to deck cargo, but in which there was a clause "freight and all other conditions as per charterparty." In an action for freight by the shipowner against the consignees of a part of the cargo which had been carried on deck, the defendants counter-claimed for damage to their cargo:—

*Held* (by A. L. Smith and Collins L.JJ., Rigby L.J. dissenting), that the conditions of the charterparty incorporated into the bill of lading were limited to such as were to be performed by the consignee, and did not include the exemption of the shipowner from liability in respect of deck cargo.

Appeal from a judgment of a Divisional Court.

The action was by a shipowner to recover freight from the consignees of a portion of the cargo. The vessel was chartered to carry a full and complete cargo of timber from Norway to the port of London, "including a deck cargo at merchant's risk." The defendants were consignees of a part of the cargo, which was carried on deck, but the bill of lading contained no reference to a deck cargo. It contained no exception, but there was in it the following clause: "freight and all other conditions as per charterparty dated 1st August, 1896," which was the charterparty above referred to.

The action was tried in the Mayor's Court of London, and the defendants counter-claimed for damage to the timber consigned to them. The damage was not disputed, but the plaintiff claimed to be exempt from liability for such damage by reason of the incorporation in the bill of lading of the condition as to deck cargo at merchant's risk contained in the charterparty. The learned judge decided in favour of this contention, and gave judgment for the plaintiff on the claim and counter-claim.

The Divisional Court (Day and Lawrance JJ.) on appeal gave judgment on the counter-claim in favour of the defendants.

The plaintiff appealed.

Nov. 3. *Lawson Walton, Q.C.*, and *E. Bray*, for the plaintiff. The decision of the Divisional Court makes the bill of lading in effect an absolute contract to carry the goods, without any of the exceptions contained in the charterparty. Such a contract is so unusual that it is plain some of the exceptions must have been intended to be incorporated. The question then comes to be, what is the proper interpretation of the words of the bill of lading in this particular case? It is true that the words "payment of freight and all other conditions as per charterparty" have been held to incorporate those conditions only that fall on the consignee: *Russell* v. *Niemann* (1); but in the present case the words are different. Freight is treated as one of the conditions, and the sentence set out fully runs thus: "conditions as to freight and all other conditions as per charterparty." Consequently all the conditions applicable to a bill of lading are incorporated, and among others the condition as to deck cargo.

[They cited *Wegener* v. *Smith* (2); *Gray* v. *Carr*. (3)]

*J. A. Hamilton*, for the defendants. The case is covered by authority, from *Russell* v. *Niemann* (1) to *Serraino* v. *Campbell* (4) and *Manchester Trust* v. *Furness*. (5) The fact that "payment of" is omitted before "freight" does not distinguish those cases from the present one, because the expressions must be equivalent. If so, the conditions which are incorporated are those that are to be performed or submitted to by the consignee to entitle him to receive the goods. Only such conditions are to be incorporated, and not exceptions and limitations. The incorporation of an exception from liability in respect of deck cargo would contradict the bill of lading, which says nothing about deck cargo, and presumably refers to cargo carried between decks. A number of other incongruous results might arise if the plaintiff's contention is right, as, for instance, where one of

(1) (1864) 17 C. B. (N.S.) 163.
(2) (1854) 15 C. B. 285.
(3) (1871) L. R. 6 Q. B. 522.
(4) [1891] 1 Q. B. 283.
(5) [1895] 2 Q. B. 282, 539.

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the terms is that money should be advanced should the captain require it. Could it be said that such a term was incorporated so as to enable the captain to sue the consignee? [He cited also *Gullischen* v. *Stewart*. (1)]

*Lawson Walton, Q.C.*, in reply.

*Cur. adv. vult.*

Nov. 22. A. L. SMITH L.J. read the following judgment:—We are called upon in this case, as it appears to me, to consider the at one time much debated question as to how much of a charterparty is incorporated into a bill of lading which contains the words "he or they paying freight and all other conditions as per charterparty."

The point arises thus. The plaintiff, the shipowner, sues the defendants, who are the receivers of cargo under a bill of lading, for freight. The defendants counter-claim for damage to cargo during the voyage, the cargo having been carried on deck, whereby it became damaged, and not delivered in like good order and condition as when shipped. The shipowner replies to this claim of the bill-of-lading holder that by the charterparty he was at liberty to carry a deck cargo at merchant's risk, that this term was incorporated into the bill of lading, and thus he is not liable to the defendants for the damage counter-claimed for.

The question in this case, therefore, is, whether this term of the charterparty as to "the deck cargo being carried at merchant's risk" is incorporated into the bill of lading by the words "freight and all other conditions as per charterparty," for, if not, the plaintiff (the shipowner) is liable under the counter-claim to the defendants.

The bill of lading in question was given for a portion of a timber cargo to be carried from Norway to London, the material parts of which are as follows:—

"Shipped in good order and condition . . . . red wood (specifying it) . . . . to be delivered in like good order and condition at the port of London unto orders. Freight and all other conditions as per charterparty."

(1) (1884) 13 Q. B. D. 317.

Now, there is a body of authority which has established conclusively that the words in a bill of lading, "they paying freight for the goods and all other conditions as per charterparty," do not incorporate all the conditions of the charterparty, but only those conditions "which would apply to the person who has taken the bill of lading, and in taking delivery of the cargo, such as payment of demurrage, the payment of freight, the manner of paying, and so on." These are not my words, but the words of Lord Blackburn in the House of Lords in *Taylor* v. *Perrin*. (1)

It would be mere waste of time to go through all the cases upon this question, especially as this was done by the late Kay L.J. in this court in the year 1890 in the case of *Serraino* v. *Campbell*. (2) I will just take three cases to shew what has been held to be incorporated in a bill of lading containing the words "they paying freight and all other conditions as per charterparty," and what is the rule of construction to be applied thereto.

Thirty-three years ago, in the case of *Russell* v. *Niemann* (3), the late Willes J., after consideration, gave the judgment of the Court of Common Pleas upon this point as follows. He said: "We disposed of the first question in this case yesterday; and we now proceed to dispose of the second, which is, whether the exception contained in the bill of lading is expanded by the exception in the charterparty. That depends upon whether the words 'and other conditions as per charterparty' include all the stipulations and conditions contained in that instrument, or whether they are not limited to conditions ejusdem generis with that previously mentioned, viz., payment of freight—conditions to be performed by the receiver of the goods. It is a mere question of language and construction; and we think it is enough to say that the latter is the construction which we put upon these words."

This case has never been overruled; but, on the contrary, this Court in *Serraino* v. *Campbell* (2), at p. 287 and p. 294 of the

(1) See p. 295 of the report of *Serraino* v. *Campbell*, [1891] 1 Q. B. 283.

(2) [1891] 1 Q. B. 283.

(3) 17 C. B. (N.S.) 163, at p. 177.

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report, point out that it was expressly approved of by the House of Lords.

In that case Lord Esher M.R. laid down the rule of construction which was to be applied thus: "After full consideration, I think that the words ought to be construed as meaning all those conditions of the charterparty which are to be performed by the consignee of the goods." Lopes L.J. cited Lord Blackburn's words which I have above referred to, and Kay L.J. reviewed all the authorities in order of date, and arrived in the end at the same result as Lord Esher M.R. and Lopes L.J.

Again in the year 1895, in *Manchester Trust* v. *Furness* (1), my brother Mathew treats this rule of construction as then well known and settled, as in truth it was; and in the same case upon appeal (2) the present Master of the Rolls, Sir Nathaniel Lindley, said, with reference to the words in a bill of lading, "they paying freight and other conditions as per charterparty": "The effect of that reference has been considered more than once: it has been considered in *Serraino* v. *Campbell* (3), and also in *Fry* v. *Chartered Mercantile Bank of India* (4), and the effect of the reference is to incorporate so much of the charterparty as relates to the payment of freight and other conditions to be performed on the delivery of the cargo. But there is no authority whatever for incorporating more than that."

If ever there was a rule of construction laid down and settled by overwhelming and conclusive authority, from the House of Lords downwards to the court of first instance, it is this, and yet it is now insisted upon by the shipowner that when by his captain he signed the bill of lading in this case upon August 19, 1896, containing the words "freight (in print) and all other conditions as per charterparty," the word "paying" being left out, he, by so doing, incorporated into the bill of lading conditions which otherwise would not have been incorporated, and which it was well known would not be. With the contention

(1) [1895] 2 Q. B. 282, at p. 286.
(2) [1895] 2 Q. B. 539, at p. 545.
(3) [1891] 1 Q. B. 283.
(4) (1866) L. R. 1 C. P. 689.

that the word "freight" does not mean "paying freight" in this mercantile document, I cannot agree, for in my judgment the words "freight" and "paying freight" therein mean the same thing; and had it not been for my brother Rigby's opinion to the contrary, I should not have thought the present question open to argument.

If we were to accede to the plaintiff's contention we should, in my opinion, be unsettling that which has long been settled, and upon the faith of which business has been transacted for years, and nothing could well be more mischievous than this.

In my judgment, the rule of construction above mentioned applies to all bills of lading which seek to incorporate parts of a charterparty by the words "he or they paying freight and all other conditions as per charterparty," or "freight and all other conditions as per charterparty," unless there is something therein clearly shewing that the well-known rule is to be excluded. To point out that the contract of carriage contained in the bill of lading in the present case is absolute, and without exception, does not, in my opinion, avail the shipowner, for this does not shew that the rule is to be excluded, for it is as applicable to a bill of lading containing no exceptions as to one containing exceptions.

I rest my judgment in this case upon the grounds above stated, and I do not propose to discuss the question whether the term in the charterparty "including a deck cargo at merchant's risk" is or is not inconsistent with the bill of lading which is silent as to a deck cargo, and only covers a cargo which is to be carried at shipowner's risk.

I think that my brothers Day and Lawrance were right in holding that the clause in the charterparty now sought to be incorporated by the shipowner was not incorporated into the bill of lading, and that this appeal must be dismissed.

RIGBY L.J. read the following judgment:—After the best consideration which I have been able to give to this case, I am unable to concur in the conclusion that the counter-claim of the defendants should succeed. The amount claimed is very

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small, but the principle of interpretation involved is of great importance.

The evidence shewed that the terms of the charterparty were usual in the trade in the sense of being frequently adopted, but did not shew such an established usage as could be presumed to be the basis of every contract of the kind.

The question, therefore, is one of construction only, and the issues appear to be reducible substantially to two: first, whether the words "freight and all other conditions as per charterparty" contained in the bill of lading are to be so construed as to extend only to conditions to be performed by the holder of the bill of lading, in which case none of the terms of the charterparty relieving the shipowner from responsibility would be introduced. Secondly, whether the clause relied upon as a defence to the counter-claim ought not to be treated as incorporated by the general words of reference on the ground of its being repugnant to the other terms of the bill of lading.

As to the first issue, I would observe that the argument depends, in my judgment, mainly, if not entirely, upon the decisions of which *Serraino* v. *Campbell* (1) is a conspicuous and, I think, the latest direct example, though it has been recognised in later cases.

I guard myself from the first by saying that I have not the slightest intention of laying down anything inconsistent with that class of cases. The decisions are binding upon the Court; but I may be allowed to say that if they did not exist I should have had little difficulty in arriving at a similar conclusion in a similar case arising for the first time. The real question is what these cases in fact decide; and it is as important not to extend them, so as to cover a case not really included, as to preserve their authority with reference to cases really covered by them. I have gone through all those cases, and, without referring to them in detail, I will say at once that no one of them appears to me to go beyond what was laid down by Willes J. in *Russell* v. *Niemann*. (2) The reference to the charterparty in that case was contained in these words of the

(1) [1891] 1 Q. B. 283. (2) 17 C. B. (N.S.) 163.

bill of lading, "paying freight for the said goods and all other conditions as per charterparty."

In the whole line of cases down to and including *Serraino* v. *Campbell* (1) the words to be construed did not differ substantially from these. In each case there was the exact equivalent of the words "paying freight for the said goods," and the words "all other conditions" followed immediately afterwards. At p. 177 of the report of *Russell* v. *Niemann* (2) Willes J. says: "We disposed of the first question in this case yesterday; and we now proceed to dispose of the second, which is, whether the exception contained in the bill of lading is expanded by the exception in the charterparty. That depends upon whether the words 'and other conditions as per charterparty' include all the stipulations and conditions contained in that instrument, or whether they are not limited to conditions ejusdem generis with that previously mentioned, viz., payment of freight—conditions to be performed by the receiver of the goods. It is a mere question of language and construction; and we think it enough to say that the latter is the construction which we put upon these words."

It is to be observed that the learned judge by construction puts in the words "to be performed," and I gather that if he had not felt himself entitled to do that he would have held that all the stipulations of the charterparty ought to be incorporated (see his statement at p. 174 of the point to be decided). In *Serraino* v. *Campbell* (1) each of the learned judges (Lord Esher M.R. and Lopes and Kay L.JJ.) refers to the passage above quoted, and treats it as the foundation of the decision in the later case. It is plain to my mind that, following *Russell* v. *Niemann* (2), the Court of Appeal in *Serraino* v. *Campbell* (1) treated the matter as purely one of construction of the very words used, and had no intention of laying down any general rule as to the meaning of the words "all other conditions as per charterparty" independently of the introductory words "they paying freight." I have looked through all the cases cited, and I have not found one in which, independently of words of introduction equivalent to the words "paying freight," the

(1) [1891] 1 Q. B. 283. (2) 17 C. B. (N.S.) 163.

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words "all other conditions as per charterparty" have been cut down by construction to conditions to be performed by the holder of the bill of lading.

In the absence of such words the Court of Appeal in *Gardner* v. *Trechmann* (1) seem to me to have held that the words of reference, "other conditions as per charterparty," when not controlled by the context, are sufficient to introduce all the terms of the charterparty not repugnant to the contract contained in the bill of lading. What amounts to such a repugnancy as to lead to the rejection of any term, and in what cases such a result follows, will be dealt with in discussing the second question.

Meantime the effect of the word "freight" preceding the words "and all other conditions" has to be considered. If the word conveys a meaning equivalent to "paying freight" the case is brought within the principle of *Russell* v. *Niemann* (2), because then it expressly refers to one condition to be performed by the bill-of-lading holder. But, in the first place, the forced character of the construction suggested seems to me to result from a comparison of the reasoning in the class of cases so often referred to and the present. The insertion in the former of the word "performing," so as to make the whole phrase run "paying the freight and performing all the other conditions," is natural and perhaps even inevitable: see per Lord Bramwell in *Gray* v. *Carr*. (3) Its insertion in the present case, making the phrase run "freight and performing all the other conditions," is at once seen to be putting a strain upon the original words which, in my judgment, they will not bear. You cannot in fact bring in "performing" without first getting in "paying," or something of the sort.

Now, "freight as per charterparty" means, in its obvious and primâ facie sense, freight as fixed or ascertained by the charterparty and nothing else. The phrase no more carries as part of the meaning of the language the idea of payment than it would do if the rate followed the word in the bill of lading itself without having to be imported from the charterparty. In each

(1) (1884) 15 Q. B. D. 154. (2) 17 C. B. (N.S.) 163.
(3) L. R. 6 Q. B. 522.

case the fixing of the rate would indeed involve, as a consequence arising by implication of law, the obligation to pay at that rate; but on the question of construction it is necessary to distinguish clearly between the interpretation of the language used and the consequences arising in law from using it. The interpretation of the words ought to precede the implications of law, and the language actually used ought not, in my judgment, to be altered so as to put in an express condition when it is only implied.

On the whole I am of opinion that the authorities relied upon are not applicable, and that the reference cannot be cut down to mean only conditions to be performed by the holder of the bill of lading. The second question remains, whether the term "a deck cargo to be taken at merchant's risk" is to be rejected as repugnant to the bill of lading; and this must be decided in accordance with the general principles of interpretation applicable, not to bills of lading only, but to all contracts, and indeed to all written instruments. It is plain that a clause incorporating, by general words only, terms of another contract will not incorporate any terms of the latter which are outside the scope and nature of the first.

The bill of lading is a contract for carriage, and in so far as the charterparty may contain terms not applicable to such a contract they will not be treated as incorporated. But no such question arises here. The special term proposed to be introduced has direct reference to the carriage of the goods.

The first and most general rule of construction is that the document under consideration is to be construed according to the plain meaning of the words used. This is subject to certain ancillary rules, not having the force of law, but intended to serve in proper cases as guides to the true interpretation. The only one of these applicable to the present case, if it is applicable, may, I think, be thus formulated. If the literal construction leads to an absurdity, repugnancy, or inconsistency which reasonable people cannot be supposed to have contemplated under the circumstances, it ought if possible to be modified so as to avoid such a result.

On the question of inconsistency, I doubt whether the rule

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ought ever to be applied except where the inconsistency arises between two terms of the contract, one being a term appearing on the face of it to be the result of a special bargain between the parties, and the other being a term proposed to be introduced by general words—such a case as that of *Gardner* v. *Trechmann* (1), already referred to. It was impossible there to explain why the parties specified a particular rate of freight in the bill of lading if they really meant the higher rate mentioned in the charterparty to rule. The bill-of-lading freight was therefore treated as governing.

If this be the correct view, the rule referred to would be only a way of asserting the maxim "Generalia specialibus non derogant," and would have no application to the present case.

The words of the bill of lading, "to be delivered in like good order and condition," bear no sign of a special agreement. They are in fact in such a document the most ordinary and general words, and in almost every case their effect is cut down and controlled by the subsequent language of the document.

True it is that if they were uncontrolled they would involve an absolute contract on the part of the shipowner to deliver which would be broken even if the goods were lost by ordinary sea risks without negligence of any kind. Such a contract is not an impossible one, though it taxed the ingenuity of counsel to indicate cases in which it would practically arise independently of a special bargain at a rate of freight higher than the ruling rate. Here the rate of freight when originally fixed was fixed with reference, not to an absolute contract on the part of the shipowner, but to a limited one; and it would be a remarkable result if the bargain in the bill of lading were held to entitle the shipowner only to the same freight as the consideration for a much more onerous obligation. But I do not think it legitimate to treat the words quoted from the bill of lading as standing alone and unexplained. They are subject to the words which follow, and ought to be construed as so subject, and not as containing the whole contract.

Whether I am right or not in giving to the ancillary rule of construction the limitation which I have suggested, it seems to

(1) 15 Q. B. D. 154.

me that this case can be decided on a much broader ground. Before we have recourse to the ancillary rule at all, we should be satisfied that the literal interpretation involves something unreasonable; and the question arises whether it is not reasonable to suppose that the parties to the contract intended to cut down the earlier words.

The case stands thus. In nearly every bill of lading and in nearly every charterparty there are provisions cutting down and limiting the absolute obligation of the shipowner to deliver. Is it more reasonable to suppose that the parties intended the contract to be interpreted literally, and so to incorporate the terms of the charterparty, or not?

In the first alternative they would be entering into a common and ordinary contract, and the shipowner would be getting in freight a consideration commensurate with a limited obligation. In the second they would be entering into a contract of so exceptional a nature that it is difficult to understand how any shipowner should submit to it, or any shipper of goods insist upon it, the freight payable having been fixed with a view to the excepted risks. In my judgment, the literal interpretation of the contract in this case is the most reasonable, and therefore the correct one, and no occasion arises for resort to the ancillary rule of construction founded on repugnancy or inconsistency.

COLLINS L.J. read the following judgment:—I am of opinion that the judgment in the Court below is right and ought to be affirmed.

It is not necessary to recapitulate the facts which have been already stated in the judgments delivered. The short question is: Is the indorsee of this bill of lading, being for a portion only of a cargo shipped on the plaintiff's vessel, bound by a provision in the charterparty that deck cargo is carried at merchant's risk? The bill of lading, which contains no exceptions, is on its face an acknowledgment that the goods in question are shipped in good order and condition, with an undertaking to deliver them in like good order and condition at the port of London. Then follow the words which gave rise to the

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question in discussion, "freight," which is in print, and written after it, "And all other conditions as per charterparty dated 1st August, 1896."

The obligation of the shipowner, therefore, on this bill of lading is absolute, and certainly does not protect him from liability for damage to deck cargo, unless he can find such protection, by reason of its incorporation, from the charterparty.

I am of opinion that the words which I have cited are not capable of the meaning sought to be put upon them by the shipowner. They are words whose meaning has repeatedly been considered in decided cases, and the view stated by Willes J. in *Russell* v. *Niemann* (1) as long ago as 1864, namely, "They are limited to conditions ejusdem generis with that previously mentioned, viz., payment of freight—conditions to be performed by the receiver of the goods"; and again in substantially the same terms by Lord Blackburn in *Taylor* v. *Perrin* (2); and, finally, by Lord Esher in 1891 in *Serraino* v. *Campbell* (3), must be taken as establishing the principle upon which these words are to be interpreted.

The rule is thus stated by Lord Esher in the last case: "After full consideration, I think that the words ought to be construed as meaning all those conditions of the charterparty which are to be performed by the consignee of the goods. If this be so, then the perils of the sea are not conditions which are to be performed by the consignee—indeed, they are not conditions which have to be performed by any one."

The ground on which this rule rests is that, inasmuch as freight has to be paid by the consignee as a condition of receiving the cargo, the words "other conditions" are to be read in their natural meaning, and, following upon the word "freight," must be taken to import conditions to be performed by the consignee in relation to the receiving by him of the cargo. I think it can make no possible difference to this construction that the words "payment of" before "freight" are omitted. "Freight," in my judgment, is obviously equivalent to "payment of freight" or "he or they paying freight," other-

(1) 17 C. B. (N.S.) 163.
(2) See *Serraino* v. *Campbell*, [1891] 1 Q. B. 283, at p. 295.
(3) [1891] 1 Q. B. 283.

wise it could not be described as a condition so as to justify the words "other conditions" which follow it. The canon of construction above stated is, therefore, applicable to this bill of lading, and excludes all terms of the charterparty which cannot be brought under the category of conditions to be performed by the consignee. It has been urged that the absence of exceptions in the bill of lading is a reason for giving a larger interpretation to the words "all other conditions as per charterparty." In my judgment, this fact can make no difference, the basis of the rule being what I have stated.

Exceptions, whether they are few or many, or wanting altogether, in the bill of lading, are not thereby turned into conditions to be performed by the consignee: they are merely terms of the bargain between the shipowner and the charterer. To hold otherwise would be to disturb a rule which, having regard to the length of time it has been established, must have been the basis upon which mercantile men have acted in numberless instances in framing their mercantile documents. Further, even if the word "conditions" could be interpreted in this larger sense, another question would arise. The bill of lading might have comprised only that part of the cargo which was in fact carried upon deck, and its absolute words import a contract to carry under deck; for there was no proof here of any custom to control them: *Royal Exchange Shipping Co.* v. *Dixon* (1); *Gould* v. *Oliver*. (2) If, therefore, this provision from the charterparty were to be read into it, there would be at one and the same time in the bill of lading an absolute contract to carry under deck, and at the risk of the shipowner, all the goods comprised therein, and an imported provision that they might nevertheless be carried on deck and at the risk of the consignee.

Whether such an exception might not be so large as to eat up and destroy the express contract, and therefore to be incapable of being read into it (see instances of void exceptions, Com. Digest, "Fait" (E. 7)), it is not necessary to decide.

I have not thought it necessary to go through all the cases bearing on this discussion: that process has been gone through

(1) (1886) 12 App. Cas. 11. (2) (1840) 2 M. & G. 208.

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several times already, and in *Serraino* v. *Campbell* (1), after a full review of all that had been decided up to that date, the law was laid down by Lord Esher in the terms which I have stated. One reported case only on the point has arisen since then, namely, *Manchester Trust* v. *Furness*. (2), and in that case the canon enunciated by Lord Esher in *Serraino* v. *Campbell* (1) is again applied.

*Appeal dismissed.*

Solicitors for plaintiff: *Harper & Battcock.*
Solicitors for defendants: *W. A. Crump & Sons.*

A. M.

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## LEWIS, APPELLANT; POOLE, RESPONDENT.

*Local Government—Parish Council—Custody of Parish Documents—Tithe Apportionment—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 17, *sub-s.* 8—*Justices—Jurisdiction—Order for Removal of Parish Documents—Tithe Act*, 1860 (23 & 24 *Vict. c.* 93), *s.* 28.

A parish council has power, under s. 17, sub-s. 8, of the Local Government Act, 1894, to direct that the copy of the tithe apportionment of the parish in the custody of the incumbent of the parish under 6 & 7 Will. 4, c. 71, s. 64, shall be removed from his custody and deposited with the council.

Where the parish council has given such a direction, and the county council has affirmed it, a court of summary jurisdiction has jurisdiction, under s. 28 of 23 & 24 Vict. c. 93, to make an order enforcing the removal.

CASE stated, under the Summary Jurisdiction Acts, by justices of the peace of the county of Southampton, sitting as a court of summary jurisdiction at Droxford in the same county.

An application was made to the justices by the appellant, chairman of the parish council of the parish of Westmeon in the Droxford petty sessional division, for an order, under 23 & 24 Vict. c. 93, s. 28 (3), that the tithe apportionment and

(1) [1891] 1 Q. B. 283.
(2) [1895] 2 Q. B. 539.
(3) 23 & 24 Vict. c. 93, s. 28: "Whenever any person, other than the persons legally entitled to the possession of the same, shall have possession of the sealed copy of any confirmed instrument of apportionment, it shall be lawful for any two justices of the peace for the county or other juris-

map of the parish of Westmeon should be removed from the custody of the respondent, the incumbent of the parish, and be deposited in the custody of the parish council, or as they might direct.

The following material facts were stated in the case. In 1895 the tithe apportionment and map were in the custody of the respondent, and in October of that year the parish council of Westmeon passed a resolution directing, under the Local Government Act, 1894, s. 17 (1), that the apportionment and map should be placed in their custody. The respondent having refused, after notice of this resolution, to hand over the apportionment and map to the parish council, application was made on their behalf to the county council, to determine the difference which had arisen between the parish council and the respondent as to the custody of the apportionment and map.

The county council, having considered the application, made an order that the apportionment and map should be deposited in such custody as the parish council might direct. Notice of this order having been duly given to the respondent, he refused

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diction within which the lands mentioned in the said apportionment are situate, upon the application of any person interested in the lands or rentcharge, and upon fourteen days' notice in writing of such application to the person or persons in whose custody such copy shall be at the time of such application, to hear and determine such application; and upon hearing such application the said justices may order such copy to be removed from the custody of the person holding the same and to be deposited in such other custody as the said justices, having reference to the security and due preservation of such copy, and to the convenience of the parties interested therein, may think fit."

(1) The Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 17, sub-s. 8: "The custody of the registers of baptisms, marriages, and burials, and of all other books and documents containing entries wholly or partly relating to the affairs of the church or to ecclesiastical charities, except documents directed by law to be kept with the public books, writings, and papers of the parish, shall remain as provided by the existing law unaffected by this Act. All other public books, writings, and papers of the parish, and all documents directed by law to be kept therewith, shall either remain in their existing custody, or be deposited in such custody as the parish council may direct. The incumbent and churchwardens on the one part, and the parish council on the other, shall have reasonable access to all such books, documents, writings, and papers, as are referred to in this sub-section, and any difference as to custody or access shall be determined by the county council."

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to obey it, and still retained the custody of the apportionment and map; and thereupon the appellant made his application to the justices under 23 & 24 Vict. c. 93, s. 28.

On the hearing of that application the justices were of opinion that they had no power, under 23 & 24 Vict. c. 93, s. 28, to make the order applied for, and therefore refused to make it.

The questions for the opinion of the Court were, Whether the justices' decision was correct in point of law; and, if not, what should be ordered or done in the premises.

*Lord Coleridge, Q.C.* (*Cancellor* with him), for the appellant. The justices were wrong in coming to the conclusion that they had no jurisdiction to make an order under 23 & 24 Vict. c. 93, s. 28. The tithe apportionment and map are documents "directed by law to be kept with the public books, writings, and papers of the parish," within the meaning of s. 17, sub-s. 8, of the Local Government Act, 1894. The direction is contained in 6 & 7 Will. 4, c. 71, s. 64 (1), which also, it is true, provides that one copy of every confirmed instrument of apportionment shall be deposited with the incumbent and church or chapel wardens of the parish. But s. 17, sub-s. 8, of the Local Government Act, 1894, gives the parish council power to remove the documents from the custody of the incumbent and churchwardens, and when the direction of the parish council was confirmed by the county council in this case, the incumbent became a person "other than the person legally entitled to the posses-

(1) 6 & 7 Will. 4, c. 71, s. 64: "Two copies of every confirmed instrument of apportionment, and of every confirmed agreement for giving land instead of any tithes or rent-charge, shall be made and sealed with the seal of the said commissioners, and one such copy shall be deposited in the registry of the diocese, within which the parish is situated, to be there kept among the records of the said registry, and the other copy shall be deposited with the incumbent and church or chapel wardens of the parish for the time being, or such other fit persons as the commissioners shall approve, to be kept by them and their successors in office with the public books, writings, and papers of the parish, and all persons interested therein may have access to and be furnished with copies of or extracts from any such copy on giving reasonable notice to the person having custody of the same. . . . ."

sion of the same," within 23 & 24 Vict. c. 93, s. 28. Sect. 17 of 9 & 10 Vict. c. 73, which provides that the place of deposit of the copy of a confirmed apportionment may be altered by quarter sessions on the application of a person interested, does not apply here, because there has been no application to quarter sessions, or order made by them.

*Macmorran, Q.C.*, for the respondent. The respondent, as incumbent of the parish, was the person legally entitled to the custody of these documents by virtue of 6 & 7 Will. 4, c. 71, s. 64, and the parish and county council respectively ought not to have directed their removal. Sect. 17, sub-s. 8, of the Local Government Act, 1894, only applies to documents to be kept with the public books, writings, and papers of the parish, where there is no existing express statutory direction as to the custody of such documents. Next, the justices were right in holding that they had no jurisdiction to order the removal of the apportionment and plan from the custody of the respondent. Sect. 28 of 23 & 24 Vict. c. 93, only applies where a person other than the persons legally entitled to the possession of the apportionment has possession of it. In such a case justices have a discretion to direct its removal, having regard to all the circumstances; but if the direction of the parish council affirmed by the county council is to prevail, the justices' jurisdiction ceases to be discretionary. Sect. 17, sub-s. 8, of the Local Government Act, 1894, did not intend to effect such a change in jurisdiction. The only tribunal empowered to settle disputes as to the custody of an instrument of apportionment is the court of quarter sessions, which is given that power by 9 & 10 Vict. c. 73, s. 17. By 58 Geo. 3, c. 69, s. 6, the vestry had power to direct who should have the custody of parish books, documents, writings, and public papers, except the registry of marriages, baptisms, and burials. Then, by 6 & 7 Will. 4, c. 71, s. 64, one of the two sealed copies of every confirmed instrument of apportionment is to be deposited with the incumbent and church or chapel wardens of the parish. The Local Government Act, 1894, only meant to give the parish the same power as the vestry had under the Act of Geo. 3, with respect to the custody of parish documents.

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WRIGHT J. Two questions arise here. The first is whether, on what may be termed the merits of the case, the direction of the parish council ought to prevail; the second, whether the justices had power to accede to the application made to them by the appellant. I do not think there is much doubt on the first question. By s. 17, sub-s. 8, of the Local Government Act, 1894, all documents directed by law to be kept with the public books, writings, and papers of the parish, shall either remain in their existing custody, or be deposited in such custody as the parish council may direct, and any difference as to custody or access shall be determined by the county council. In the present case the parish council in 1895 directed that the tithe apportionment and map should be kept in a particular way. The respondent objected, and the county council have affirmed the direction of the parish council. It was contended by counsel for the respondent that the documents in question are not, within the words of s. 17, sub-s. 8, "documents directed by law to be kept with the public books, writings, and papers of the parish, because s. 64 of 6 & 7 Will. 4, c. 71, though it provides that they are to be kept with such public books, writings, and papers, contains the further provision that they are to be kept by the incumbent and church or chapel wardens of the parish for the time being, or such other fit persons as the commissioners shall approve. I think that, whether they are directed to be kept by one or other person, they are equally directed by law to be kept with the public books, writings, and papers of the parish, and, therefore, that they are within s. 17, sub-s. 8, of the Local Government Act, 1894.

The second question is whether the proper procedure has been adopted. One objection to the procedure was based on s. 17 of 9 & 10 Vict. c. 73, which provides, in substance, that if the place of custody of such documents as those in question be found inconvenient, the court of quarter sessions may alter the place otherwise appointed by law for their custody. The answer to that objection is, I think, that although the court of quarter sessions might have made an order for that purpose, and possibly by such order have rendered an application like the present one no longer possible, they have

not in fact been asked to make such an order, and have never made one. They have never exercised their jurisdiction in that respect, and, therefore, if any other court or body has jurisdiction, that jurisdiction has not been ousted. It was said also that the justices of the court of summary jurisdiction had no jurisdiction because of the terms of s. 28 of 23 & 24 Vict. c. 93. It was not suggested that the appellant was not a "person interested" within the meaning of that section—clearly he was—but it was said that the jurisdiction exercised under s. 28 was discretionary, and the jurisdiction which the justices were called upon to exercise, if the provisions of s. 17, sub-s. 8, of the Local Government Act, 1894, applied, was ministerial and not discretionary. That argument raises, to my mind, a considerable difficulty, but it is not conclusive. I think that probably the Local Government Act, 1894, has changed the character of the jurisdiction which the justices have to exercise, and that, upon an application to them to enforce a direction of the parish council, affirmed by the county council, they ought to hesitate long before they find reasons for overruling that direction so affirmed. It may be, but I do not decide the point, that the Act of 1894 has changed the character of the jurisdiction from a discretionary to a ministerial jurisdiction; but I am of opinion that, at any rate, the justices have power to act. The only remaining question is, whether, at the time the application to the justices was made, the respondent was a person not legally entitled to the possession of the tithe apportionment and map, so that s. 28 of 23 & 24 Vict. c. 93, applied to the case. That, again, depends upon the meaning of s. 17, sub-s. 8, of the Act of 1894. If the parish council had power under that section to direct the removal of these documents, it follows that their direction, when made and when affirmed by the county council, did change the respondent's legal right and title with respect to the custody of the documents; and thereupon the person into whose custody they were directed to be removed became the person legally entitled, to the exclusion of the legal title of the respondent. I may add that, assuming our decision to be right, the justices ought to attach the greatest weight to the direction of the parish council, affirmed by the county council,

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even if that direction be not absolutely binding upon them, as I am inclined to think it is. The case must go back to the justices with the expression of our opinion that they had jurisdiction to make the order asked for by the appellant.

KENNEDY J. I agree with the conclusions arrived at by my brother Wright. I think we ought not to do more than send the case back with the statement of our view that the justices had jurisdiction to make the order applied for. We are further asked by the case to say what should be done or ordered by the court of summary jurisdiction in the premises. We cannot say that. They must hear the matter of the application, our decision being only that they have jurisdiction to hear it. I agree with what my brother has said with respect to the weight which they ought to attach to the direction of the parish council, affirmed, as it is, by the county council.

*Case sent back accordingly.*

Solicitor for appellant: *E. W. J. Peterson.*

Solicitors for respondent: *Attree, Johnson & Ward, for Shield & Mackarness, Alresford.*

W. A.

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*Dec.* 9.

## KNOWLES & SONS, LIMITED, APPELLANTS; SINCLAIR, RESPONDENT.

*Weights and Measures—Coal—Ticket—"Correct Weight"—Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 22.

When coal is conveyed for delivery on sale in bulk, in a vehicle not belonging to the purchaser, the "correct weight," which is required by s. 22 of the Weights and Measures Act, 1889, to be inserted in the ticket which is to be given to the purchaser, is the weight as ascertained at the place from which the coal is brought, and not the weight at the time of delivery.

CASE stated by justices.

The appellants, who were colliery proprietors, were summoned in respect of an offence under s. 22, sub-s. 2, of the Weights

and Measures Act, 1889 (1), for not having inserted or caused to be inserted in the ticket, required by the Act to be given by them to the purchaser, a statement of the correct weight of the vehicle and the animal drawing the same as well as the correct weight of the coal contained in the vehicle.

On December 29, 1896, an assistant inspector of weights and measures saw a cart of the appellants loaded with coal in bulk; he followed it to a house, and there saw the coal delivered, and at the same time saw a ticket delivered to the purchaser of the coal by the appellants' carter. On the ticket there was a statement that the cart and horse weighed 29 cwt. He then took the horse and cart to a weighing-machine at the railway-station, and there caused the same to be weighed together, when the weight was shewn to be 28 cwt. 3 qrs., or a difference

(1) The Weights and Measures Act, 1889 (52 & 53 Vict. c. 21):—

Sect. 21: "(1.) Where any quantity of coal exceeding two hundredweight is delivered by means of any vehicle to a purchaser, the seller of the coal shall therewith deliver, or cause to be delivered, or to be sent by post or otherwise, to the purchaser or to his servant, before any part of the coal is unloaded, a ticket or note according to the form in the Third Schedule to this Act, or according to a form to the like effect."

Sect. 22: "(1.) Where any quantity of coal exceeding two hundredweight is conveyed for delivery on sale in a vehicle in bulk, the seller of the coal shall, unless the vehicle is provided by the purchaser, cause the weight of the vehicle, as well as of the coal contained therein, to be previously ascertained by a weighing instrument stamped by the inspector of weights and measures, and being on or near to the place from which the coal is brought, and shall from time to time cause the tare weight of the vehicle to be marked thereon in such manner as the local authority approve.

"(2.) In any such case the seller of the coal shall insert or cause to be inserted in the ticket required by this Act to be given by him a statement of the correct weight of the vehicle, or of the vehicle and of the animal drawing it where both are weighed together with the load, as well as of the correct weight of the coal contained in the vehicle."

The form in the Third Schedule is as follows:—

"Take notice that you are to receive herewith tons cwts. lbs. of coal

[*When sold in sacks, add*]

in sacks, each containing cwt.

| | tons | cwts. | lbs. |
|---|---|---|---|
| Weight of coal and vehicle .. .. .. .. | | | |
| Tare weight of vehicle .. .. .. .. .. | | | |
| Net weight of coal herewith delivered to purchaser .. | | | |

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KNOWLES & SONS v. SINCLAIR.

of 28 lbs. between the weight shewn on the ticket and the weight registered by this machine. This difference was in favour of the purchaser.

The justices convicted the appellants, and stated this case for the opinion of the Court.

*T. Willes Chitty*, for the appellants. There was no evidence of any offence under s. 22, sub-s. 2, of the Weights and Measures Act, 1889. The "correct weight," which is required by sub-s. 2 to be inserted in the ticket, is the weight ascertained, in accordance with sub-s. 1, at or near the place from which the coal is brought, and not the weight at the place of delivery. It is clear from the provisions of s. 21 that the weight must be ascertained and inserted in the ticket before the coal is sent out by the seller, for the ticket may be sent by post to the purchaser before the coal is delivered. There is no evidence that the "correct weight," as ascertained at the place from which the coal was brought, was not inserted in the ticket.

*Loehnis*, for the respondent. The weight inserted in the ticket must be the correct weight at the time of delivery of the coal to the purchaser. The object of the Act is to protect the purchaser, and the purchaser can only test the weight at the time of delivery, and has no means of finding out what was the correct weight at the place from which the coal was brought.

HAWKINS J. I think that this conviction ought to be quashed. It is provided by s. 21, sub-s. 1, of the Weights and Measures Act, 1889, that where a quantity of coal exceeding 2 cwt. is delivered by vehicle to a purchaser, the seller shall therewith deliver or shall send by post or otherwise to the purchaser, before the coal is unloaded, a ticket according to the form in Sched. III. That form provides for a statement of the weight of the coal, the weight of the coal and vehicle, and the tare weight of the vehicle. Then s. 22 provides that, where more than 2 cwt. of coal is conveyed for delivery on sale in bulk in a vehicle not provided by the purchaser, the weight of the vehicle and the coal must be ascertained on a weighing-machine at or near the place from which the coal is brought, and the tare weight

of the vehicle must be marked thereon; and, further, that in such case the correct weight of the vehicle, or of the vehicle and horse if both are weighed together, as well as the correct weight of the coal, are to be inserted in the ticket. Reading all those provisions together, it is clear that the intention of the Act is that the weighing is to be done at the place from which the coal is sent, and that the weight so ascertained is to be inserted in the ticket, for the ticket may be sent by post to the purchaser before the coal is delivered. I am satisfied that the Act does not mean that the ticket may be filled up or altered at the time of delivery. The weight inserted in the ticket must be the correct weight as ascertained by weighing at the place from which the coal is sent. In the present case there was no fraud of any kind, and there was no evidence that the weight inserted in the ticket was not the correct weight at the time when it was inserted. The conviction must, therefore, be quashed.

CHANNELL J. I am of the same opinion. It is clear that the conviction was not right. Sect. 22 refers to a weighing before the coal is sent out, of which particulars are to be sent or delivered by ticket to the purchaser before delivery of the coal. There was no evidence that correct particulars of that weighing were not inserted in the ticket.

*Conviction quashed.*

Solicitors for appellants: *Sharpe, Parker, Pritchards & Barham, for Richardson & Marsh, Bolton.*

Solicitors for respondent: *Rowcliffes, Rawle & Co., for John Hall, Bury.*

W. A.

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*Dec.* 11.

[CROWN CASE RESERVED.]

## THE QUEEN *v.* WEST.

*Criminal Law—Offences against the Person—Time of commencing Prosecution—Criminal Law Amendment Act*, 1885 (48 & 49 *Vict.* c. 69), *ss.* 5, 9.

By s. 5 of the Criminal Law Amendment Act, 1885, it is a misdemeanor to unlawfully carnally know a girl between the ages of thirteen and sixteen, and there is a proviso that no prosecution for that offence shall be commenced more than three months after the commission of the offence. By s. 9, on the trial of an indictment for rape, the defendant may, if the jury think the facts warrant it, be acquitted of the felony and convicted of the misdemeanor under s. 5. The defendant was committed for trial for rape, the offence having been committed less than three months before his committal for trial. On his trial, which took place more than three months after the commission of the offence, he was indicted only for the misdemeanor under s. 5, and convicted:—

*Held*, that the prosecution for the misdemeanor of which he was convicted was commenced less than three months from the commission of the offence so as to comply with the proviso to s. 5.

CASE stated for the opinion of the Court for the Consideration of Crown Cases Reserved by Sir Walter Phillimore, sitting as Commissioner of Assize on the North Eastern Circuit, as follows:—

The prisoner was tried before me on November 25, 1897, at the assizes for the county of Durham, on an indictment charging him with an offence under sub-s. 1 of s. 5 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69) (1),

(1) The Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 5: "Any person who (sub-s. 1) unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years . . . . shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour. . . . . Provided . . . . that no prosecution shall be commenced for an offence under sub-s. 1 of this section more than three months after the commission of the offence."

Sect. 9: "If upon the trial of any indictment for rape, . . . the jury shall be satisfied that the defendant is guilty of an offence under section . . . . 5 of this Act, . . . but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then and in every such case the jury may acquit the defendant of

against a girl over thirteen and under sixteen years of age, committed on July 19 last.

The original charge was one of rape, and the commitment dated July 27 was for rape; but, as it appeared on the depositions that it was not a case of rape, the bill laid before the grand jury, and the indictment found by them, was for an offence under this sub-s. 1 of s. 5.

The prisoner pleaded not guilty.

At the close of the case for the Crown, counsel for the prisoner submitted that there was no case to go to the jury, or, alternatively, that I ought to direct an acquittal because of the last proviso in s. 5, "no prosecution shall be commenced for an offence under sub-s. 1 of this section more than three months after the commission of the offence," and because, the date of the offence being July 19, no prosecution under this sub-section could be said to have been commenced until at the earliest, November 22, when the indictment was laid before and found by the grand jury.

After hearing counsel for the Crown, I overruled the objection on two grounds—the first being, that the proviso does not speak of a prosecution under sub-s. 1, but of a prosecution for an offence under sub-s. 1, and that a prosecution for an actual offence under sub-s. 1 had been commenced in due time, though the offence had been wrongly described as greater than it proved to be; the second ground being, that if the indictment had been according to the commitment the prisoner could under s. 9 have been found guilty of the offence for which he was actually indicted.

The case proceeded; the prisoner was convicted and sentenced by me to imprisonment for nine calendar months with hard labour.

After conviction counsel further submitted to me that under the provisions of s. 17 of the Act in question (1), and of the

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such felony, and find him guilty of such offence as aforesaid . . . . and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence as aforesaid. . . . ."

(1) The Criminal Law Amendment Act, 1885, s. 17: "Every misdemeanor under this Act shall, in

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Vexatious Indictments Act (22 & 23 Vict. c. 17) (not in this respect affected by s. 1 of 30 & 31 Vict. c. 35), no indictment for an offence under this sub-s. 1 ought to have been allowed to be found by the grand jury, inasmuch as the prisoner had not been committed for that offence.

The questions for the consideration of the Court for Crown Cases Reserved are :—

1. Ought the Court in obedience to the proviso in s. 5 of the Criminal Law Amendment Act, 1885, to have directed an acquittal?

2. Ought the indictment, having regard to s. 17 of the same Act, to have been quashed?

3. Was the objection, if any, to the indictment cured by the prisoner pleading over to it, or by the objection not being taken till after conviction?

*Meynell*, for the prosecution. This prosecution was commenced within three months after the commission of the offence within the proviso to s. 5 of the Criminal Law Amendment Act, 1885. The misdemeanor charged under s. 5 was involved in the charge of rape, and the prosecution for that misdemeanor commenced when the prosecution for rape commenced. In *Rex* v. *Willace* (1) the proceeding before a magistrate was held to be the commencement of the prosecution, and not the preferring of the indictment. The point under the Vexatious Indictment Act is the same. The defendant was committed for trial on the charge of rape, which involved the charge of the misdemeanor under s. 5, sub-s. 1, of the Criminal Law Amendment Act, 1885.

No counsel appeared for the defendant.

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England and Ireland, be deemed to be an offence within, and subject to, the provisions of the Act of the session of the twenty-second and twenty-third years of the reign of Her present Majesty, chapter seventeen, intituled 'An Act to prevent Vexatious Indictments for certain Misdemeanours,' and any Act amending the same, and no indictment under the provisions of this Act shall in England be tried by any court of quarter sessions."

(1) Durham Summer Assizes, 1797, afterwards heard before all the judges —MS. Jud.: see 1 East, P. C. 186.

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LORD RUSSELL of KILLOWEN C.J. This is a case reserved for our consideration by Phillimore J. The facts are: The prisoner was brought before the magistrates on a charge of rape, and was committed by them for trial on that charge. He came up to be tried before Sir Walter Phillimore, sitting as commissioner, at the last Durham Assizes. When so tried more than three months had elapsed from the date of the offence, whether that offence was rape or anything else, with which he could be charged. When the counsel or solicitor who appeared for the prosecution came to consider the matter, it appeared to them not to be proper to put the prisoner on his trial for rape, inasmuch as the evidence on the depositions rather pointed, as I gather, to consent on the part of the person against whom the offence was committed. Accordingly, an indictment was sent up under the Criminal Law Amendment Act, 1885, charging the prisoner with having committed the offence specified in s. 5, sub-s. 1, namely, of having unlawful carnal knowledge of a girl of or above the age of thirteen years and under the age of sixteen years. I have to observe that if, instead of taking that course, the prosecution had thought fit to send up an indictment for rape conformably to the commitment for trial, no question need have arisen, because if it appeared on the trial that it was unsafe or improper to convict the prisoner of rape, it would be open to the judge to direct the jury that they might find him guilty of the offence specified in s. 5, or of an indecent assault. The course of sending up an indictment for rape was not pursued; the indictment sent up only charged an offence under s. 5, sub-s. 1. The point taken for the prisoner is this: It was said that, the indictment being a substantive indictment for misdemeanor under s. 5, the final proviso of that section applied, which provides that "no prosecution shall be commenced for an offence under sub-s. 1 of this section more than three months after the commission of the offence." The question is—and it is the only question, because the point raised with respect to the Vexatious Indictments Act is the same—can it be properly said that the prosecution for the offence of which the prisoner was convicted was commenced within three months after the commission of the offence? I

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think it was, on the short ground that a prosecution for rape is in fact and in substance a prosecution for any offence of which, on an indictment for rape, the prisoner could have been found guilty. It does not seem to me necessary that an indictment for rape should go before the grand jury under such circumstances as these. The evidence upon which the magistrates committed the prisoner for trial was evidence upon which they might have had some doubt whether the offence amounted to rape; but they might well think that no harm would be done to the prisoner, nor to justice, by committing him for rape, because if that offence were not made out he could be convicted of the lesser offence under s. 5. I think the principle "Omne majus continet in se minus" applies. I am of opinion that the learned judge was right in refusing to direct an acquittal or to quash the indictment, and that our judgment should be for the Crown.

HAWKINS J. I am of the same opinion. I entertain no doubt upon the question submitted to us.

MATHEW J. I am of the same opinion. The same question arises under the Vexatious Indictments Act (22 & 23 Vict. c. 17), which is applied to prosecutions by s. 17 of the Criminal Law Amendment Act, 1885. It seems to me that to sustain the objection made on the defendant's behalf would practically be to repeal s. 17. I cannot think that s. 9 was intended to have any such effect.

GRANTHAM J. I am of the same opinion, and I should be sorry if we came to a different decision. It would always be necessary to send up an indictment for rape, and to have a true bill returned for rape, where the case really did not shew that such a serious offence had been committed. That has been too often done, in my experience, and I think it ought not to be done.

DARLING J. I am of the same opinion. I think there are many inconveniences, with respect to trial, in charging a person with felony when he is only likely to be convicted of mis-

demeanor; it is better that he should be charged only with what he appears to have done.

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*Conviction affirmed.*

Solicitor for prosecution: *Solicitor to the Treasury.*

W. A.

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[CROWN CASE RESERVED.]

1897 *Nov.* 11; *Dec.* 11.

## THE QUEEN *v.* COX.

*Criminal Law—Offences against the Person—Cruelty to Children—Proof of Age of Child—Prevention of Cruelty to Children Act*, 1894 (57 & 58 *Vict.* c. 41).

On the trial of an indictment for unlawfully and wilfully neglecting children under the age of sixteen, contrary to the Prevention of Cruelty to Children Act, 1894, the children were not produced before the Court, and the only evidence as to their ages was that of two persons who said that they had seen the children and stated what they believed were their respective ages, all of them being under sixteen, and that of the mistress of a school who said that the elder children attended a public elementary school, and she believed they were within the statutory age limit:—

*Held*, that there was evidence proper to be left to the jury that the children were under sixteen.

CASE stated for the opinion of the Court for the Consideration of Crown Cases Reserved by the chairman of the Worcestershire Quarter Sessions.

The two defendants were tried at the quarter sessions on an indictment charging them, in several counts, with having unlawfully and wilfully neglected certain children under the age of sixteen years, who were in the defendants' custody and charge, in a manner likely to cause such children unnecessary suffering and injury to health, contrary to the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41).

At the trial evidence was given for the prosecution in order to establish that some of the children, who were not produced before the Court, were under the age of sixteen. Such evidence, as stated in the third paragraph of the case, was as follows: "It was proved by the officer of the National Society for the

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Prevention of Cruelty to Children that he had seen the children, and he stated what he believed were their respective ages, all of which were under sixteen. A police constable gave evidence generally confirming the officer. The mistress of the school was called, and said that the children attended a public elementary school, and she believed they were under the statutory age limit for such schools."

Upon objection taken by counsel for the defendants that this was not sufficient evidence to go to the jury that the children were under sixteen, the chairman overruled the objection, and left the case to the jury, who convicted one of the defendants.

One of the questions for the opinion of the Court was whether there was any legal evidence of the age of the children to go to the jury.

*Stamford Hutton*, for the defendant. The age of the children should have been strictly proved by the best evidence —i.e., by producing the certificate of the birth of the child, and identifying the child as the person named in that certificate. Sect. 17 of the Prevention of Cruelty to Children Act, 1894, provides that if a child appears to the Court to be under the specified age, it shall be deemed to be under that age for the purposes of the Act, unless the contrary is proved. That section implies that where the child is not brought before the Court, the age must be strictly proved by the prosecution. [He referred to *Rex* v. *Wedge* (1); *Reg.* v. *Day*. (2)]

*Clarke Hall*, for the prosecution, was not heard.

LORD RUSSELL of KILLOWEN C.J. The fourth question upon which our opinion is asked is, whether there was any legal evidence of the children's age to go to the jury. Counsel for the defendant said that the only legal evidence of the age was the production of the certificate of birth, coupled with evidence of identity. There is no such statutory requirement. The fact that the child is under the age of sixteen may be proved by any lawful evidence. The evidence here was that

(1) (1832) 5 C. & P. 298. (2) (1841) 9 C. & P. 722.

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which is stated in the third paragraph of the case. [His Lordship read the third paragraph.] It is, in my opinion, impossible to say that there was not evidence, proper to be left to the jury, that the children were under sixteen. The conviction must be affirmed.

The rest of the Court (Hawkins, Mathew, Grantham, and Darling JJ.) concurred.

*Conviction affirmed.*

Solicitor for prosecution: *W. Moreton Phillips.*

Solicitors for defendant: *Clarke & Blundell, for S. Thornely, Worcester.*

W. A.

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## HUTTLEY *v.* SIMMONS AND OTHERS.

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*Dec.* 18.

*Conspiracy — Legal Injury—Combination to induce a Person not to employ another—Conspiracy to do an Act not amounting to an actionable Wrong.*

A conspiracy to do certain acts (not being criminally punishable) gives a right of action only where the acts agreed to be done, and in fact done, would, had they been without preconcert, have involved a civil injury to the plaintiff, for which he would have had a right of action.

*Kearney* v. *Lloyd*, (1890) 26 L. R. Ir. 268, approved and followed.

FURTHER CONSIDERATION before Darling J.

Action brought by the plaintiff, a cabdriver, against the defendants, Simmons, Groh, Thorpe, and Everett, who were members of a trade union, claiming damages for illegal interference with the business or work of the plaintiff, by intimidation, and for maliciously causing, or conspiring to cause, persons not to enter into contracts with, or to deal with, persons employing the plaintiff, or to compel workmen, or others, to break their contracts with the persons so employing the plaintiff, and thereby throwing the plaintiff out of employment.

The action was tried, on November 11, before Darling J. and a common jury.

The facts material to the questions of law arising in the case, and the findings of the jury, are fully stated in the judgment.

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*W. M. Thompson*, and *Lambert Bond*, for the plaintiff.
*Carson, Q.C.*, and *Roskill*, for the defendants.

*Cur. adv. vult.*

Dec. 18. The following written judgment was delivered by

DARLING J. This case was tried before me on November 11 last. The plaintiff, a cabdriver, sued the defendant Simmons, who was the president of a strike committee of a trade union, and others, who were members of the same trade union, for damages sustained by the plaintiff in consequence of the defendants having induced a cab proprietor named Young to refuse to engage the plaintiff to drive a cab for him, or to let a cab to the plaintiff to be so driven. The statement of claim alleged that the defendants acted maliciously in this respect, and also that they conspired together, and with others, to induce Young not to employ the plaintiff nor permit him to hire or drive a cab. I directed the jury that there was no evidence against any of the defendants except Simmons; that there was no evidence of a contract between plaintiff and Young or any other person to employ plaintiff to drive a cab, or to let a cab on hire to plaintiff; that there was no evidence that defendant Simmons did anything to prevent any other person than Young from employing plaintiff. In answer to questions left to them by me the jury found as follows:—

1. Did defendant Simmons induce Young not to engage plaintiff to drive a cab for him, or to let on hire to plaintiff a cab to be so driven?—Answer: Yes.

2. If so, did defendant Simmons do this maliciously, in this sense: did he induce Young to refuse to employ plaintiff, or to let a cab on hire to him, for either of the following reasons—

(*a*) In order to injure plaintiff?—Answer: Yes.

(*b*) Or to procure some indirect advantage for himself the defendant?—Answer: No.

(*c*) Or to procure such advantage for others for whom defendant was acting?—Answer: Yes.

3. Did defendant Simmons conspire with others, with other

members of the Cab Drivers' Union for example, to induce Young not to employ the plaintiff, nor to permit him to hire and drive a cab?—Answer: Yes.

And the jury assessed the damages at 5*l.*

Upon these findings I entered judgment for the defendants Groh, Thorpe, and Everett. With regard to the defendant Simmons, I reserved judgment, having regard to the fact that this case must depend, except as to the finding on the question of conspiracy, upon the decision of the House of Lords in the case of *Allen* v. *Flood* (1), which was then awaiting judgment on appeal to the House of Lords from the judgment of the Court of Appeal.

This I did in order to save the parties the expense of an appeal from my judgment, had I followed the decision of the Court of Appeal in *Allen* v. *Flood* (2), as I should have been bound at that time to do. The House of Lords gave judgment on the 14th of this month in favour of the appellant in *Allen* v. *Flood* (2), and that judgment binds me, as I understand it, to enter judgment in this case for the defendant Simmons upon every finding of the jury except that regarding conspiracy by the defendant. Nothing in this case, which was done by the defendant, would have amounted to an actionable wrong, except it were done maliciously, in the sense defined by the Court of Appeal in *Allen* v. *Flood* (2), and found by the jury in this case; and I take the House of Lords to have now decided that the existence of a bad motive, in the case of an act which is not of itself illegal, will not convert that act into a civil wrong for which reparation may be due.

This case, however, although in a great measure governed by the decision of the House of Lords in *Allen* v. *Flood* (2), is not concluded by that judgment. For in this case the jury have found that the defendant conspired with others to induce a person not to employ the plaintiff nor to permit him to hire and drive a cab.

Upon the question thus raised the judgment in *Allen* v. *Flood* (2) is, I humbly conceive, of no absolute authority,

(1) [1898] A. C. 1.

(2) *Flood* v. *Jackson*, [1895] 2 Q. B. 21; reversed by *Allen* v. *Flood*, [1898] A. C. 1.

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although Lord Shand in his judgment makes the following observations in this connection :—

"The case was not presented by the learned judge to the jury as one of conspiracy, and does not raise any question of that kind. Combination of different persons in pursuit of a legitimate trade object occurred in the case of the Mogul Steamship Company (1), and was there held to be lawful. Combination for no such object, but in pursuit really of a malicious purpose to ruin or injure another would, I should say, be clearly unlawful; but this case raises no such question." (2)

With every respect for this expression of his Lordship's opinion on this matter, I am bound to observe that, by his own confession, this is merely obiter dictum; and therefore I must look elsewhere for authority.

Now I take it to have been established by the judgment of the House of Lords in *Allen* v. *Flood* (3) that (conspiracy apart) nothing proved to have been done by the defendant in this case amounted to an actionable wrong. Does, then, his having conspired with others to do those things render such, otherwise innocent, acts illegal and wrongful—so as to give plaintiff a right of action against him?

I think I am bound by authority to come to a contrary conclusion.

In the case of *Reg.* v. *Warburton* (4) Cockburn C.J., delivering the judgment of the Court, says: "It is sufficient to constitute a conspiracy if two or more persons combine by fraud and false pretences to injure another. It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, i.e., amount to a civil wrong."

From the statement of the Court that it is enough if these

(1) *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, (1888) 21 Q. B. D. 544; affirmed (1889) 23 Q. B. D. 598, and [1892] A. C. 25.

(2) [1898] A. C. 1, at p. 168.

(3) *Flood* v. *Jackson*, [1895] 2 Q. B. 21; reversed by *Allen* v. *Flood*, [1898] A. C. 1.

(4) (1870) L. R. 1 C. C. 274, at p. 276.

acts do amount to a civil wrong, it is to be inferred that there would be no illegal conspiracy did those acts not amount to a civil wrong at the least. Now it is true that the judgment there was pronounced in a criminal case; but in the well-known case, *Mogul Steamship Co.* v. *McGregor* (1), Lord Coleridge C.J. speaks thus: "It cannot be, nor indeed was it, denied, that in order to found this action there must be an element of unlawfulness in the combination on which it is founded, and that this element of unlawfulness must exist alike, whether the combination is the subject of an indictment or the subject of an action."

This question is, moreover, to my mind, concluded by the very learned and altogether admirable judgment of Palles C.B. in *Kearney* v. *Lloyd* (2), which is to the effect that conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would, had they been without preconcert, have involved a civil injury to the plaintiff.

In this case it appears to me that I am bound, by the decision of the House of Lords, to hold that none of the acts done, or agreed to be done by the defendant, gave the plaintiff any right of action for injury in law to any legal right of his; and, therefore, my judgment must be for the defendant.

*Judgment for defendant Simmons.*

Solicitor for plaintiff: *George Jolly.*

Solicitors for defendants: *Pattinson & Brewer.*

(1) 21 Q. B. D. 544, at p. 549; affirmed 23 Q. B. D. 598, and [1892] A. C. 25.

(2) 26 L. R. Ir. 268.

P. B. H.

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*Oct.* 26, 27;
*Nov.* 8.

[IN THE COURT OF APPEAL.]

# TAYLOR *v.* MAYOR, ALDERMEN AND BURGESSES OF NEW WINDSOR.

*Tolls—Prescriptive Right—Extinguishment of old Franchise by Statute.*

A municipal corporation had in the year 1734 a prescriptive right to take certain customary tolls for the passage of carriages, cattle, &c., over a bridge belonging to them. From one only of these tolls, namely, a toll in respect of hackney carriages, freemen of the borough were exempt. In 1734 the corporation obtained a local Act, which, after reciting the existence of their right to take the customary tolls and enumerating those tolls, provided that the said customary tolls should be and remain vested in them. The Act further provided that it should be lawful for the collectors appointed by the corporation to demand the respective tolls before mentioned from all persons other than freemen of the borough. In the year 1819 the corporation obtained another local Act, by which the former Act was repealed, and they were empowered to take down the old and build a new bridge, and to take tolls for passage over it which exceeded in amount the old tolls and included additional subject-matters. There was no exemption in this Act in favour of freemen. This last-mentioned Act was a temporary Act, and its provisions had been allowed to expire:—

*Held*, that the prescriptive right of the corporation to take tolls had been extinguished, and a statutory right substituted for it, by the local Act of 1734, or, if not by that Act, then by the local Act of 1819.

By Rigby L.J. and Collins L.J.: The Act of 1734 having given a statutory title to the tolls which had been previously taken by virtue of a prescriptive right, the title by prescription was merged in and extinguished by the statutory right.

Appeal from the judgment of Lord Russell of Killowen C.J. at the trial before him without a jury.

The action was brought by the plaintiff to recover the sum of 2*d.*, which he had paid to the defendants as a toll for passage over a bridge, known as Windsor Bridge, in a hired cab, for a declaration that the defendants were not entitled to levy any tolls for the passage over Windsor Bridge, and for an injunction to restrain them from levying tolls from the plaintiff for passage over the bridge. The defendants in their defence set up a right by prescription or lost grant to take tolls (including the toll in question) for passage over and under the bridge.

The evidence, documentary and otherwise, shewed that from a period long antecedent to living memory down to the passing of a local Act of 9 Geo. 2, c. xv., in the year 1734, the defendant corporation had taken certain tolls, including the toll in question, for passage over a bridge belonging to them which crossed the Thames at Windsor.

By the local Act, 9 Geo. 2, c. xv., it was recited that the mayor, bailiffs, and burgesses of the borough of New Windsor, in the county of Berks, were lawfully seised of the great bridge over the Thames, known as Windsor Bridge, and the way thereon leading from New Windsor to Eton, in the county of Bucks, and were obliged by reason of their tenure to repair the same, and for that purpose were entitled to receive certain customary tolls for pontage and passage over and under the said bridge. The statute then enumerated the various tolls which the corporation were entitled to take in respect of vehicles, cattle, horses and other things, which included a toll of 2*d.* for every hackney coach, not a freeman's, and a toll of 6*d.* for every barge going under the bridge down stream. The statute then recited that the bridge was in a ruinous condition, and that no provision was made for supporting the same otherwise than by the moneys arising from the profits of the tolls, the payment whereof had been of late refused by several persons, and could not be recovered but by bringing separate actions against each particular person so refusing, which must be attended with great expense and delay. The Act proceeded to enact that the bridge, and the way thereon, and the customary tolls for pontage and passage over and under the same should "be and remain vested in the said mayor, bailiffs, and burgesses and their successors" who should stand for ever chargeable for the repairing, maintaining, and new making of the said bridge and way, when and as often as need should require. The Act further provided that it should be lawful for the persons appointed collectors by the corporation to collect, demand, and take of all persons (other than freemen of the borough) who should drive, lead, or conduct any such carriages, cattle, horses, barges, or other things for which any such customary tolls had been paid for pontage or passage over or

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under the said bridge, the respective tolls before mentioned, and, upon their neglect or refusal to pay such tolls, to deny or hinder any passage over or under the said bridge until payment thereof, and to distrain any such carriages, cattle, horses, barges, or other things or any of the goods and chattels of such persons who should so lead, drive, or conduct any such carriages, cattle, horses, barges, or other things, or any of the goods and chattels of the owner or owners thereof, and to detain the same until payment of the tolls, and, after the space of five days after such distress, to sell what should be so distrained for payment of the tolls.

By a local Act, 59 Geo. 3, c. cxxvi., passed in 1819, it was recited that the mayor, bailiffs, and burgesses of the borough of New Windsor were lawfully seised of a timber bridge over the River Thames called Windsor Bridge; that by an Act made in the ninth year of his late Majesty King George II. they were authorized to collect, demand, and take tolls for certain cattle and carriages passing over and for barges passing under the said bridge, but such tolls were "very unequally and partially laid and not duly proportioned"; that the timber bridge was narrow and incommodious, and so greatly decayed that in the judgment of able and experienced workmen it ought to be taken down and a new bridge built; that the corporation were desirous for the accommodation of the public to build a new bridge over the said river near the present bridge; but by an estimate made of the expense thereof it appeared that the tolls which they then received for passing over and under the existing bridge would fall far short of defraying the expense of a safe and commodious bridge, and that therefore it was expedient and necessary to make some other provisions for the same. The Act proceeded to enact, "in order to enable the said mayor, bailiffs, and burgesses to build a proper and convenient bridge and to defray the expense thereof and of keeping the same in repair for ever," that, when and as soon as the said bridge should be taken down or rendered impassable, the said recited Act should be and the same was thereby repealed, and it should be lawful for the mayor, bailiffs, and burgesses of the borough of New Windsor to build a new bridge

with stone, brick, timber, iron, and other substantial materials across the River Thames upon the site of or at a proper distance from the present bridge. In s. vi. of the Act it was provided that, in consideration of the great expense that would attend the building the said bridge, and the repairing and supporting the same, and the making the ways and passages, and the keeping the same in good repair, and of the loss which the said mayor, bailiffs, and burgesses would sustain by the ceasing of the several tolls which they were then entitled to take and receive by virtue of the before-recited Act, the said new intended bridge while in building and when built should be the property of and vested in them for ever, and that it should be lawful for them to erect one or more toll-gate or toll-gates on the bridge, and that the respective tolls following should be taken by the persons whom they should appoint, at one only of the said gates, of the person or persons passing with or attending any horse or horses, beast or beasts, cattle, or carriages, before the same should be permitted to pass through such gate. The Act then proceeded to give a list of tolls which exceeded in amount the tolls mentioned in the Act of 1734 and included matters which were not the subject of those tolls. There was no exemption of freemen from the tolls under the Act of 59 Geo. 3 and no toll was given in respect of barges passing under the bridge. A power of seizure and distress was given for the tolls. Sect. xxxv. of the Act empowered the corporation to borrow for the purposes of the Act a sum not exceeding 16,000*l.* and to mortgage the tolls as security for repayment of the same. By s. xxxvi. it was provided that the corporation might raise any part of the said sum of 16,000*l.* by granting bonds under their common seal to the person or persons who should advance or lend the same. Sect. xxxvii. provided that out of the first money arising or to arise by the tolls which should be collected by virtue of the Act or out of the first money which should be borrowed on the credit thereof the corporation should in the first place pay the expenses incident to obtaining and passing the Act, and repay all sums of money which should be advanced by any person or persons together with lawful interest for the same, and all expenses of surveys, plans, and estimates for rebuilding

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the said bridge, and after payment thereof all the money which should come to their hands by virtue or for the purposes of the Act should from time to time be applied in building the said new intended bridge and keeping the said bridge in repair and opening and making proper and convenient avenues and approaches to the said bridge and in defraying all other necessary charges and expenses attending the execution of the Act and in paying the interest of the principal money so to be borrowed and in otherwise carrying the Act into execution, and to or for no other use, intent, or purpose whatsoever. By s. xl. it was provided that, if the new bridge was not completed within five years from March 1, 1820, all the powers and authorities given by the Act should cease, save and except only as to so much of the bridge as should have been completed within such period. By s. liv. it was provided that nothing in the Act contained should prejudice the rights, or tend, or be construed to defeat or abridge the corporation of the powers granted to them by their charters, but that the said corporation should continue to hold and enjoy such rights, privileges, benefits, and advantages as were granted to them in and by their said charters, or to which they were entitled by prescription or otherwise in as full, ample, and beneficial a manner to all intents and purposes as they did before the passing of the Act or could or might have done in case the Act had not been made, anything in the Act contained to the contrary notwithstanding. Sect. lv. provided that the said bridge should not be deemed or taken to be a county bridge, and that the inhabitants of the counties of Berks or Bucks should not be subject or liable to the repairing, rebuilding, or supporting the same. Sect. lvii. provided that the Act should commence upon March 1, 1820, and should from thenceforth continue and be in force for and during the term of twenty-one years, and from thence to the end of the then next session of Parliament.

By a local Act, 5 & 6 Vict. c. viii., passed in 1842, it was recited that the mayor, bailiffs, and burgesses had borrowed large sums of money under the Act of 59 Geo. 3, which they had expended in building the new bridge and carrying into effect the other purposes of the Act, whereby a considerable debt,

amounting in the whole to 10,550*l.*, had been contracted and was still due and owing by the said trustees, and that the term of the said Act was about to expire, and that it was just and reasonable that it should be continued for an additional term of years to enable the corporation to pay off the said debt, and to provide funds for keeping the bridge in a proper state of repair. The Act proceeded to enact that the Act of 59 Geo. 3 should continue to be in force from and after the passing of the Act for the space of thirty-one years, and from thence to the end of the then next session of Parliament.

When this last-mentioned Act expired the corporation did not apply for any further powers, the debt having been then paid off.

The contention for the corporation was that their prescriptive right to take tolls was not destroyed but only suspended by the legislation which had taken place, and therefore, upon the expiration of the term mentioned in the Act of 1842, they were entitled again to take the prescriptive tolls for passage over the bridge.

The Lord Chief Justice held (1.) that down to 1734, the date of the passing of the Act of 9 Geo. 2, c. xv., the defendants were entitled by prescription to take tolls for passage over their bridge; and (2.) that that prescriptive right of taking tolls was not merged or extinguished either by the Act of 9 Geo. 2, c. xv., or by that of 59 Geo. 3, c. cxxvi.; for that the effect of the former of those Acts was merely to give increased powers for enforcing the payment of the prescriptive tolls, while leaving untouched the tolls themselves and the foundation of the right to take them; and that the effect of the latter Act, whereby upon the rebuilding of the bridge the defendants were entitled to take tolls larger in amount and wider in their subject-matter than the old prescriptive tolls, was to suspend the prescriptive right of taking tolls during the continuance of that Act, but that on the expiry of that Act (as extended) in 1874 the prescriptive right again revived.

He accordingly gave judgment for the defendants.

Oct. 26, 27. *J. G. Witt, Q.C.*, and *Danckwerts*, for the

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plaintiff. (1) The effect of the local Act of 1734 was to extinguish the prescriptive right of the corporation to take the customary tolls for passage over and under the bridge. By that Act Parliament conferred on the corporation a statutory right to take tolls of the same amount as those to which they had previously been entitled by prescription, except that none of the tolls were under the statute to be levied on freemen of the borough. The effect of such a confirmation of a prescriptive right by Act of Parliament is to merge or extinguish the prescriptive right which is thereby converted into a statutory right: *Manchester Corporation* v. *Lyons* (2); *Manchester Corporation* v. *Peverley* (3); Com. Dig. 5th ed. vol. vii. p. 100, title Prescription G.

If the Act of 9 Geo. 2 did not extinguish the prescriptive right, it was clearly destroyed by the Act of 59 Geo. 3, which provided for the building of an altogether new bridge, and the levying of a wholly different set of tolls from which freemen were not exempted.

The prescriptive tolls were leviable in respect of the old wooden bridge, which has ceased to exist. The modern structure built under the provisions of the Act of 1819, and which the corporation are only bound to repair out of the funds provided by that Act, cannot for this purpose be considered as identical with the old bridge which the corporation repaired ratione tenuræ.

The local Act of Geo. 3 really amounted to a parliamentary bargain, whereby the corporation, giving up the old prescriptive tolls, and being relieved of their obligation to repair the old bridge ratione tenuræ, were empowered to build a new bridge and take the tolls enumerated in that Act, and were only to be liable for the repair of the new bridge out of those tolls.

(1) It has not been thought necessary for the purpose of this report to do more than merely indicate the heads of the argument, which turned mainly on a minute analysis of the provisions and language of the local Acts. The arguments as regards the construction of the Acts may be sufficiently gathered from the judgments. The case is reported as valuable rather by way of illustration of the considerations on which the question whether an Act of Parliament has extinguished a prescriptive right turns than as a decision on the construction of the particular local statutes involved.

(2) (1882) 22 Ch. D. 287.

(3) (1876) Reported in a note to *Manchester Corporation* v. *Lyons*, 22 Ch. D. 294.

[They also cited *Warren* v. *Windle* (1); *Abergavenny Improvement Commissioners* v. *Straker*. (2) ]

*Crackanthorpe*, *Q.C.*, and *Courthope-Munroe*, for the defendants. This is a case, not of a mere private prescriptive right, but of a customary right and liability of a public character. In such a case a mere confirmation of the prescriptive right by statute will not destroy or merge the prescription. The case contemplated in Comyns' Digest, 5th ed. vol. vii. p. 100, title Prescription G. is one of a mere private prescriptive right. It may be that, in the case of such a right, if the Crown granted the same right by charter the prescription would be gone. But the same considerations do not apply to the case of a statute merely confirming a public customary right. The Act of 9 Geo. 2 expressly recognises the existence of the prescriptive right and leaves it standing, except so far as the liability of freemen to the tolls is concerned. The limitation of the prescription in the latter respect would not destroy it. The object of the Act was merely to give certain statutory facilities for enforcing the prescription. It is laid down in Comyns' Digest, 5th ed. vol. vii. p. 99, title Prescription F. 3, that, when a statute is in the affirmative only, a man may prescribe for the same matter. It is contended that the statute 9 Geo. 2 was affirmative only within the meaning of that proposition. The local Act of 59 Geo. 3 may have suspended the prescription during its continuance, but did not extinguish it. The Legislature could hardly have intended to destroy the prescriptive right by a merely temporary Act, thus leaving no provision for the repair of the bridge, if the provisions of the Act were not continued, and by s. liv. they expressly reserved to the corporation all rights to which they were entitled by prescription. It is contended that the new bridge is identical with the old one for the purposes of the prescription. The substitution of a stone structure for the old wooden bridge cannot destroy the identity of the bridge for this purpose. The local Acts did not amount to such a parliamentary bargain as suggested. The case is not analogous to those in which a private Act of Parliament has been spoken of as a statutory bargain. These Acts

(1) (1803) 3 East, 205. (2) (1889) 42 Ch. D. 83.

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were passed really for the benefit of the public using the bridge, not for the benefit of the corporation.

*Danckwerts*, in reply.

*Cur. adv. vult.*

Nov. 8. The following judgments were read:—

A. L. SMITH L.J. This action is brought by the plaintiff to test the right of the defendants, the mayor and corporation of Windsor, to levy a toll of 2*d.* upon every hackney coach passing over Windsor Bridge.

The Lord Chief Justice of England who tried the case found, and this finding is not impeached, that, prior to the passing of the Act 9 Geo. 2 in the year 1734, the corporation had by virtue of prescription founded upon the theory of a lost grant a right to take the toll in question, and he also held, though with some doubt, that the legislation which had taken place since that date in relation to the tolls had not extinguished this right, and that it had remained suspended and in abeyance for the 140 years intervening between the passing of 9 Geo. 2 and the termination by effluxion of time of the last Act upon the subject, namely, 5 & 6 Vict. c. viii., in the year 1874. The Lord Chief Justice accordingly entered judgment for the defendants, and the plaintiff appeals.

The real point for determination is the effect the statutes which were passed in 1734, in 1819, and in 1842 in relation to these tolls have upon the old franchise founded upon prescription. There is in the judgment of the late Bowen L.J., in the case of *Manchester Corporation* v. *Lyons* (1), a passage which so clearly defines what are the questions to be decided in this case that I will at once cite it, to bring matters to a point before going to the statutes which I must hereafter consider in some detail. The Lord Justice says: "When there is a franchise created by charter and the Legislature afterwards operates upon it, it is obvious that the Legislature can do exactly what it pleases. It can either leave the old franchise standing, and place a new parliamentary right beside it, or it may leave the old franchise standing and incorporate certain statutory

(1) 22 Ch. D. 287, at p. 310.

incidents into the old franchise, provided it makes its intention clear; or it may extinguish the old franchise either expressly or by implication, and substitute in its place, not a franchise properly so called, but parliamentary rights and obligations as distinct from a franchise."

Now into which of these three classes does the legislation which has taken place as to the tolls during the last century and a half bring the present case? That is the question, and this brings us at once to the year 1734, when the first Act (9 Geo. 2) was passed. At that time the corporation of Windsor were under liability ratione tenuræ to repair and maintain the bridge, and by prescription (as found by the Lord Chief Justice) were entitled to receive tolls for passage over and under the bridge. What those tolls were will be found set out in the first recital to the Act of 1734 (9 Geo. 2). Every coach, animal, article, and barge as therein enumerated passing over or under the bridge was liable to the tolls there set forth, excepting the one toll of 2*d.* for a hackney coach, as regards which a freeman's hackney coach was exempt. These being the rights and obligations of the corporation in and prior to 1734, in that year they went to Parliament and obtained the first Act (namely, 9 Geo. 2) in relation to the bridge and its tolls. This Act, after reciting that the bridge was then in a ruinous condition, and that no provision was made for supporting the same otherwise than by moneys arising from the tolls, the payment whereof had of late been refused by several persons and could not be recovered but by bringing separate actions against each particular person so refusing, which must be attended with great expense and delay, enacted—first, that the bridge and the customary tolls should be and remain vested in the corporation, who should stand for ever chargeable for the repairing, maintaining, and new making of the bridge, when and as often as need should require; secondly, that it should be lawful for the corporation to collect, demand, and take the customary tolls of all persons except freemen; thirdly, upon a refusal to pay a power to deny passage over or under the bridge, also a power of distress coupled with a power of sale was given. Now what does this Act do? Does it leave

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A. L. Smith L.J.

the old franchise founded upon prescription standing, or does it bring into existence a parliamentary right as distinct from a franchise? By the old right founded upon prescription the corporation were empowered to levy upon every coach, animal, and article passing over the bridge, and every barge passing under the bridge down stream, the respective enumerated tolls, excepting the one toll of 2*d.* upon every hackney carriage which was not to be levied upon a freeman's hackney carriage. By this statute not one of these tolls is to be levied upon a freeman. How can these two conflicting rights stand together? If the old franchise founded upon prescription is left standing, a freeman after the passing of the Act of 1734 was liable to all the tolls except the one, whereas by the Act he is exempted from them all. How can it be said that this Act "leaves the old franchise standing and places a new parliamentary right beside it"? For, if this be the real intention of the Legislature, this remarkable result would follow—namely, that a freeman at the same time would be liable and yet not liable to the tolls. In my judgment this cannot be and is not the true construction of the Act. Nor does the Act leave the old franchise standing, and merely incorporate certain statutory incidents thereto, for it does much more: it changes the area over which the toll is to range. This Act of 1734 in my judgment granted a substantive statutory right to tolls to be levied upon persons different from those whom the old franchise made liable to toll, and this Act consequently superseded and extinguished the old franchise founded upon lost grant, and substituted in its place a new statutory right. The case is far stronger than that put in Comyns' Digest, 5th ed. vol. vii. p. 100, title Prescription G.: "So if a man has franchises by prescription, and the King grants *the same* liberties to him by charter, he cannot afterwards claim them by prescription." The rule laid down upon this point by Little V.-C. in the case of *Manchester Corporation* v. *Peverley* (1), expressly approved of by Jessel M.R. in the case of *Manchester Corporation* v. *Lyons* (2), shews how and when an old franchise is extinguished by statute, and is in point in the

(1) Reported as a note to *Manchester Corporation* v. *Lyons*, 22 Ch. D. 294.
(2) 22 Ch. D. 287.

present case and hostile to the contention of the corporation. No evidence was given by the corporation, who, be it remembered, are now insisting upon their old franchise founded upon prescription as being still existing, as to whether between 1734 and the year 1819, when the next Act was passed in relation to these tolls (59 Geo. 3), a period of eighty-five years, the tolls were levied under the statutory right given to them by the Act of 1734, or under the old franchise; but the truth as to this seems to me to be made clear when I come to the Act of 1819 (59 Geo. 3), which the corporation then obtained, and wherein they themselves recite (s. vi.) the loss they will sustain by the ceasing of the several tolls which at present they are entitled to take and receive by virtue of the Act 9 Geo. 2. This recital is sought to be got rid of by the learned counsel for the corporation by arguing that it is bad drafting or erroneous; but in my judgment it is neither the one nor the other, but the apparent and simple truth. To hold that a right founded upon prescription has been suspended and kept in abeyance in order to make use of a substantive statutory right, even if such could be the case at law, requires very cogent facts to shew that it was so, which certainly to my mind do not exist in this case. In my judgment the Act of 1734 shews that it was the intention of the Legislature that the old franchise should be extinguished and a new statutory right given, and that this Act is alone sufficient to decide this case upon against the corporation.

I must, however, now come to the Act of 59 Geo. 3, in the year 1819. In this year the corporation again went to Parliament to obtain statutory powers in relation to the bridge and the tolls. This Act, after reciting that the tolls were very irregularly and partially laid and not duly proportioned, and that the timber bridge was narrow and incommodious and greatly decayed, and that a new bridge should be built, and that the tolls then received would fall far short of defraying the expense of erecting a safe and commodious bridge, and to enable the corporation to build such bridge and pay the expense thereof and of keeping the same in repair for ever, enacted that, as soon as the old bridge was taken down, the former Act should be repealed, and the corporation should build a new bridge with

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stone, brick, timber, iron, and other suitable materials, and (s. vi.) that, in consideration of the great expense that would attend the building the said bridge, and the repairing and supporting the same, and of the loss which the corporation would sustain by the ceasing of the several tolls which at present they were entitled to take and receive by virtue of the before-recited Act (9 Geo. 2), the new intended bridge should be the property of and vested in the corporation for ever; and that they might set up toll-gates and demand and take the tolls as in the Act set forth before passage was permitted through the gates. No power in this Act, as in that of 1734, was given to take toll for barges going under the bridge. A power of seizure and distress was also given by the Act. The tolls granted to the corporation by this Act (1819) were in amount greatly in excess of the tolls authorized by the Act of 1734, and it also authorized tolls upon some different subject-matters, and the freemen were not exempted from toll as they had been by the Act of 1734. By this Act (1819) the corporation were empowered to raise upon mortgage of the tolls 16,000*l.* for the purposes of the Act. By this Act, as I read it, the corporation were relieved from the obligation to repair excepting out of moneys received from the tolls. By s. 40 it was enacted that, if the bridge was not completed within five years from March 1, 1820, the authorities given by the Act should cease save and except only as to so much of the said bridge as should have been completed within such period. By s. 54 the rights of the corporation under charter or prescription were reserved, and by s. 57 the Act was to continue for the term of twenty-one years, and from thence to the end of the next session of Parliament. Now what is the true meaning of this Act (1819), whereby a largely increased toll was given to the corporation and different persons made chargeable with toll, for all persons without exception by this Act are made liable thereto, and different subject-matters are rendered liable to toll? How can the old franchise, which is totally different, stand together with this Act, even assuming that the Act of 1734 had never been passed? Surely the fresh, absolute, parliamentary powers contained in the Act of 1819 are such that they cannot exist alongside the old franchise and leave it

standing, and, if so, it follows that the old franchise must give way. How can two different sets of tolls, differing in amount, persons to be charged, and subject-matters to be charged, stand at one and the same time? It appears to me impossible; and therefore this Act of 1819 must be held to have extinguished the old franchise, had it existed in 1819, which in my judgment for the reasons above it did not. It is said in answer to this that this Act of 1819 is only a temporary Act for twenty-one years, and that the Legislature cannot have intended to leave the corporation without a toll at the end of that period; but the Legislature expressly prolonged the existence of the Act from the end of the twenty-one years to the end of the next session of Parliament, which last prolongation appears to me to have been given in order that the corporation might again go to Parliament if necessary for extended rights to take toll, which they in fact did when they obtained the Act of 1842 (5 & 6 Vict. c. viii.). It was argued for the corporation that by s. 54 of the Act of 1819 the rights of the corporation, whether under charter or prescription, were reserved, and this is so, but only such rights as existed when the Act was passed, and, as in my judgment these old franchise rights by prescription had been extinguished eighty-five years before the passing of this Act of 1819, there was nothing as regards this prescription upon which this section could operate. The Act of 1842, which the corporation then obtained, after reciting that the corporation had borrowed large sums of money which they had expended in building the bridge, and that 10,550*l.* was still owing by them, and that the term of twenty-one years granted by the Act of 59 Geo. 3 was about to expire, and that it was just and reasonable that the same should be continued to enable the corporation to provide funds to pay off the debt, and for keeping the bridge in proper repair, enacted that the provisions of the Act of 59 Geo. 3 should be extended for thirty-one years, and from thence to the end of the then next session of Parliament. Here again is to be found time expressly given to the corporation to apply to Parliament if they required at the expiration of the thirty-one years; but when the Act expired in 1874 the corporation sought no further powers, the debt then having been

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paid off, and it is to me obvious why they did not, for the old tolls founded upon prescription were such in amount as to carry a rental of 500*l.* a year, and the annual cost of repairing their bridge was less than 130*l.* a year. By reverting to the old tolls the corporation made a net profit of about 370*l.* per annum, a circumstance which renders it highly improbable that they would have got tolls of anything like the amount of the old tolls had they gone to Parliament.

For the reasons above whether the Act of 1734 is taken, or the Act of 1819 and of 1842 (which last two Acts for the purposes of this case may be treated as one) is considered, I think that the old prescriptive tolls were extinguished, and that the corporation after the year 1874 could not lawfully revert to such tolls and take the toll which is the subject-matter of this action. I do not allude to the point taken by the appellant that the bridge built under the Act of 1819 was such a totally new bridge that the old franchise to take toll could not apply to it, for in the view I take of the case it is totally unnecessary to consider it.

For the reasons above I think that this appeal should be allowed.

RIGBY L.J. In this case I agree with the judgment pronounced by my brother A. L. Smith and with the reasons given for it, but out of deference to the Lord Chief Justice whose judgment we are reversing, I think it right to state concisely my own conclusions in my own words. In my judgment the Act of 9 Geo. 2, c. xv., did not operate as a mere recognition of the customary title to the tolls recited to have been theretofore taken, but gave a statutory title to take tolls of the same amount with the result that the title by prescription was merged or extinguished.

The enactment contained in the 1st section of the Act, that the said customary tolls shall be and remain vested in the said mayor, bailiffs, and burgesses, and their successors, appears to me to have given such a statutory title as would make it impossible to go behind the Act and question the right to the tolls or any of them, and I do not think that the continued

existence of the prescriptive title is consistent with this. The conclusion is fortified when we find that the next section of the Act prevents any of the tolls from being taken from freemen, whilst the customary tolls, with the single exception of the hackney coach toll, could be taken on carriages, goods, or animals belonging to freemen. I think it is also material that the Act made incident to the tolls to be taken under it more advantageous remedies than could consistently with the recitals in the Act have existed in the case of the customary tolls.

In my judgment, at the time of the passing of the next Act relied upon (59 Geo. 3, c. cxxvi.), the tolls were statutory tolls only, and the recitals in that Act referring the taking of the tolls to the right under the earlier Act only are strictly correct. The reference in the preamble to the fact that the tolls are very unequally and partially laid and not duly proportioned, affords a strong indication that they were not intended to be continued either as statutory or customary tolls either during the continuance of the Act or after the expiration of the term during which it was to be in force. The object of the Act is said to be to enable the mayor, bailiffs, and burgesses to build a proper and convenient bridge, and to defray the expense thereof, and of keeping the same in repair for ever. It is inconsistent with this expression of intention that the corporation should be entitled at any time to take tolls otherwise than under the Act when once the repeal of the earlier Act had taken effect. Sect. 6 treats the "ceasing of the several tolls which at present they are entitled to take and receive by virtue of the before-recited Act" as a matter of course consequence of the repeal of the earlier Act. I cannot treat the word "ceasing" as being equivalent to "becoming suspended." It must have its plain primâ facie meaning. There is not a word in any of the Acts which can fairly be said to point to a suspending of the tolls or a renewed right to receive them, and I think that only express and clear language of enactment or absolutely necessary implication could bring about so strange a result as that the customary tolls should remain in suspense for nearly a century and a half and afterwards revive. I find nothing in the Act under discussion to renew or apply to the case of the new

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bridge the obligation imposed by the repealed Act of repairing for ever or the obligation of repairing at all otherwise than out of the statutory funds.

If such an obligation to repair for ever were either imposed or continued there would be no necessity for s. 55, and s. 57 seems to me plainly to indicate that the corporation were intended if the statutory tolls were insufficient to apply to Parliament for a renewed grant of tolls, as in fact they did apply when they got the Act of the Queen.

I consider that the Act of 59 Geo. 3, c. cxxvi., taken as a whole is a statutory recognition of the fact that the tolls depended solely upon the Act of 9 Geo. 2, c. xv., and effects an express repeal of the right to take the tolls not in any way modified by the saving clause.

I may add (although the point does not necessarily arise for determination) that I should have had great difficulty in the absence of express words of enactment or necessary implication in holding that the old prescription could attach to the new bridge.

I agree with what has been said by my brother A. L. Smith L.J. as to the Act of Victoria, and do not think it necessary to repeat it; but I may add that I rely strongly on the plain admission of the corporation that they were trustees as shewing that they had no such reserved beneficial interest as they now claim.

COLLINS L.J. I agree in the judgments which have been delivered; but as we are differing from the Lord Chief Justice, I will add a few words.

In my opinion the Act of 9 Geo. 2 operated to extinguish the prescriptive right of the corporation. It is not necessary in this case to spell out of several sections in the Act of Parliament an intention to abrogate the old right by enactments whose cumulative effect is such as to ground the inference that Parliament could not have intended the two rights to co-exist. In this case the Act has in terms enacted that the said customary tolls "shall be and remain vested in the mayor, bailiffs and burgesses, and their successors." The Act has there-

fore, in the language of Littledale J. in delivering the answer of the judges to the House of Lords in the *Islington Market Bill* (1), "embraced and confirmed" the customary right, which therefore from that time forth rested on statute and not on custom. I think that case fully justifies the first part of Little V.-C.'s statement of the law in the *Mayor of Manchester* v. *Peverley*, which is reported in the note to the *Mayor of Manchester* v. *Lyons*, 22 Ch. D. at p. 294, and was approved by Jessel M.R. in that case, and I think it covers this case. But, if it were necessary to go further to collect from the other sections of the Act the intention, which appears to me to be fully and finally stated in the passage I have cited, I think the exemption of freemen and the other matters mentioned in the judgments which have been delivered confirm the inference that the Legislature did not intend to leave the old franchise standing on its prescriptive title, but intended to substitute for it and did substitute one with different incidents resting on a parliamentary sanction. It would have been possible no doubt for the Legislature to have exempted freemen from paying the customary toll, and it would have been equally possible to have given statutory remedies for collecting it without giving to the customary franchise a parliamentary sanction; but when they have in terms purported to do so, these collateral provisions furnish additional reasons for the conclusion that the Act means what it says. These considerations would suffice to dispose of the case, since the Lord Chief Justice only arrived at his conclusion by holding that the right to the tolls continued after this Act to rest on prescription, and so continuing was only suspended by the subsequent Acts. I am however of opinion that, even if the franchise as distinguished from the statutory right could be deemed to have survived the Act of George II., it was extinguished by the Act of 59 Geo. 3, c. cxxvi. continued by the 5 & 6 Vict. c. viii. Though those Acts were temporary, they contemplated and provided for their possible extension, and I find no difficulty whatever in inferring that they were passed on the basis of the final extinction of the old franchise. The difficulty felt by the Chief Justice in treating

(1) (1835) 3 Cl. & F. 513.

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the Acts as passed on that footing, namely, that there is no obligation to repair imposed except out of the tolls, which will cease to be received when the Acts expire, is met I think by two considerations—first, that before the expiration of the period limited it might well be contemplated that there would be a sufficiently large surplus out of the largely increased tolls to be collected to form, after current repairs had been executed and the debt paid off, a fund large enough to cover the expenses of repairs in future; secondly, that they clearly contemplate that the corporation will apply if necessary for an extension of powers. It is not necessary to repeat the reasons given by my brothers on this part of the case for holding that the Legislature were proceeding on the footing that the franchise had been extinguished and could not have intended its revival; but I think there is much force in the observation of my brother Rigby, in which I entirely concur, that they could not have intended that a toll which operated so unfairly as to furnish one of the grounds—according to the recital—for passing these very Acts should revive on their expiration. But on this part of the case the Lord Chief Justice was himself of opinion that the statutory and the prescriptive toll could not co-exist, and it was only by introducing the theory of suspension as distinguished from extinction during the currency of these Acts that he got over the effect of such inconsistency. He appears to have felt considerable doubt on this part of the case. I think it would require very clear language in other parts of the Act to warrant the conclusion that the plain words of the 6th section of the Act of George III., "the ceasing of the several tolls which at present they are entitled to take and receive by virtue of the before-recited Act," mean not the final ceasing but the suspension of them. I can find no such language in the Act, and for the reasons already given I think there is no just ground for the inference drawn by the Lord Chief Justice from the general scheme of the Acts that they could not have contemplated the extinction of the former right. His judgment therefore ought to have been for the plaintiff. That an Act which, while substituting temporary provisions only, purports to repeal a prior permanent one will not be read as merely suspending

its operation during the currency of the repealing statute unless the intention of the Legislature to that effect be expressed was decided by Lord Ellenborough in *Warren* v. *Windle*. (1) I think, then, on the whole that a statutory was substituted for a prescriptive right by the Act of George II., that that right was itself repealed and another substituted by the Act of George III., and that this substituted right expired, the corporation having taken no steps to renew it in 1874.

*Appeal allowed.*

Solicitor for plaintiff: *E. Betteley.*

Solicitor for defendants: *J. J. Chapman, for G. H. Long, Windsor.* E. L.

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[IN THE COURT OF APPEAL.]

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## THE ATTORNEY-GENERAL *v.* THE NEW YORK BREWERIES COMPANY, LIMITED.

*Revenue—Probate Duty—Testator resident and domiciled Abroad—Executor de son Tort—Intermeddling with Estate—Liability to pay Probate Duty—Penalties*—55 *Geo.* 3, *c.* 184, *s.* 37—*Customs and Inland Revenue Act*, 1881 (44 *&* 45 *Vict. c.* 12), *s.* 40.

Upon the death of a testator, resident and domiciled in America, shares and debentures in an English company, of which he was the registered holder in the books of the company in London, passed by his will according to the law of his domicil to his executors in America. At their request the company registered them as the holders of two shares and a debenture in the place of the deceased, and paid to them the dividends and interest due upon the shares and debentures at the time of the testator's death. The executors, to the knowledge of the company, had not obtained, and did not intend to obtain, probate of the will in England:—

*Held*, that the company, by so dealing with the assets of the testator in England, constituted themselves executors de son tort, and were liable, upon an information filed by the Attorney-General, to pay to the Crown probate duty upon the assets so administered by them.

*Semble*, that the company, by so doing, had "taken possession of and administered" part of the deceased's personal estate in England within the meaning of s. 37 of 55 Geo. 3, c. 184, without having taken out probate, and were liable to penalties under that section.

APPEAL from the judgment of a Divisional Court (2) upon an information by the Attorney-General claiming against the

(1) 3 East, 205. (2) [1897] 1 Q. B. 738.

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defendant company such duties as would have been payable in respect of certain personal estate of one Henry Clausen, deceased, if probate of his will or letters of administration of his estate and effects had been duly obtained in England in respect of such personal estate, or otherwise that the defendant company might be ordered to pay penalties under 55 Geo. 3, c. 184, s. 37, and the Customs and Inland Revenue Act, 1881. (1)

The defendants were an English company incorporated in 1888 under the Companies Acts, 1862 to 1886, and the objects for which the company was established were (inter alia) to carry on the business of brewers, maltsters, &c., and to acquire two brewing businesses in New York then carried on by two American companies. The capital of the company (including loan capital) was divided into preference and ordinary shares and debentures. The registered office of the company was in the City of London. By art. 39 of the articles of association the company were to provide a book to be called the "Register of Transfers," which should be kept by the secretary under the control of the directors, and in which should be entered the particulars of every transfer or transmission of every share. Art. 43: "In the case of the death of a shareholder, the survivors or survivor, where the deceased was a joint holder, and the executors or administrators of the deceased, where he was a sole holder, shall be the only persons recognised by the company as having any title to his shares." By art. 44: "Any person becoming entitled to a share in consequence of the death or bankruptcy of any member may, upon producing

(1) 55 Geo. 3, c. 184, s. 37: "If any person shall take possession of and in any manner administer any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased within six calendar months after his or her decease . . . . every person so offending shall forfeit the sum of 100*l.*," and also a further sum at the rate of 10 per cent. on the amount of the stamp duty payable on the probate or letters of administration.

Sect. 40 of the Customs and Inland Revenue Act, 1881: "If any person who ought to obtain probate or letters of administration . . . . or who is required to deliver such account as aforesaid shall neglect to do so within the period prescribed by law for the purpose, he shall be liable to pay to Her Majesty double the amount of duty chargeable. . . ."

such evidence of title as the directors shall require . . . . either be registered himself as holder of the share, or elect to have some person nominated by him registered as transferee thereof." Art. 47: "A person entitled to a share by transmission shall be entitled to receive, and may give a discharge for, any dividends, bonuses, or other moneys payable in respect of the share." By art. 129 the company in general meeting might declare a dividend to be paid to the members, provided that it was no larger than that recommended by the directors; and by art. 133, the directors might from time to time pay to the members on account of the next forthcoming dividend an interim dividend.

The articles of association gave the directors of the company power to borrow sums of money to a limited amount, and to secure the repayment by the issue of debentures or debenture stock charged on all or any part of the company's property. This power was exercised, and the company and its trustees by deed granted its property to trustees to hold for the benefit of debenture-holders. The deed provided that the company should keep at their office in the City of London a register of the debentures. The deed gave a form of debenture. By the debenture the company agreed to pay the principal sum thereby secured and the interest thereon to the registered holder of the debenture for the time being, in accordance with the conditions indorsed. One of the conditions indorsed on the debentures provided that the principal moneys and interest thereby secured would be paid at the registered office of the company, or at some bank in London or Westminster to be from time to time appointed by the company and notified to the registered holders.

There was not, and never had been, any register of shares or debentures of the defendant company elsewhere than in London.

Under an agreement made in August, 1888, the defendant company acquired the two brewing businesses in the State of New York, the property being vested in trustees for the company, and they thereupon carried on and continued to carry on the business of brewing under their memorandum and articles of association in America, where a number of the debenture-

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holders and shareholders resided and received their interest and dividends.

Henry Clausen, a citizen and resident of the State of New York, and domiciled there, died in December, 1893, having by his will appointed two persons, both of New York, his executors. In January, 1894, letters testamentary of Clausen's estate were duly granted by the Court in New York to the executors, who were entitled to all the personal estate and effects, wheresoever situate, of the testator. Clausen's will was not proved in England, and no administration or representation to his estate in any form was granted or taken out in England.

At the date of his death Clausen was the registered holder in the books of the defendant company in London of preference and ordinary shares and debentures of the company of a value exceeding 10,000*l*.

At the request of Clausen's executors the defendant company transferred, in the books of the company in London, one of such preference shares, one of such ordinary shares, and one of such debentures into the names of the executors. (1) The defendant company also, at the like request, paid to the executors dividends on shares, and interest on debentures which had become due before Clausen's death. (2) The defendant company, at the times when they so transferred the shares and debenture, and paid the dividends and interest, knew that the executors did not intend to obtain probate of his will in this country.

The information alleged that by so acting the defendant company had in fact taken possession of and administered the shares, debentures, dividends, and interest so transferred, paid, and dealt with, and had become an executor de son tort thereof, and liable to the penalties and duties imposed by 55 Geo. 3,

(1) It was stated by the defendant company's counsel during the argument that the certificates were not, upon the occasion of the transfer, delivered to the company.

(2) It was stated by the defendant company's counsel that, as the profits of the company were earned in America, the usual course, which was followed in this case, was to pay the dividends and interest in that country to the shareholders and debenture-holders who resided there, the money in such cases not being first remitted to London.

c. 184, s. 37, and by the Customs and Inland Revenue Act, 1881, s. 40; and further, that the defendant company had become and were liable and ought to account to the Commissioners of Inland Revenue for the value of the personal estate of Clausen in this country, and to pay such duty as would have been payable if probate or administration to Clausen in this country had been duly obtained. The information prayed (inter alia) that it might be declared that the defendant company had become and were liable to deliver to the Commissioners of Inland Revenue an account of the shares and debentures which were registered in Clausen's name at his death, and of the dividends and interest thereon, being respectively his personal estate, and of the value of such estate, and to pay such duty (including estate duty under s. 5 of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7)) as would have been payable if probate or administration had been duly obtained in England in respect of his personal estate; and further, that the defendant company had become and were liable to the penalties imposed by s. 37 of 55 Geo. 3, c. 184, and s. 40 of the Customs and Inland Revenue Act, 1881.

The Divisional Court (Wills and Grantham JJ.) gave judgment for the defendant company. (1) The Crown appealed.

*The Solicitor-General* (*Sir R. B. Finlay, Q.C.*) and *Vaughan Hawkins*, for the Crown. The defendants are an English company having their head office and register of share and debenture-holders in England, and the shares and debentures are locally situate in this country: *Attorney-General* v. *Higgins* (2); and are subject to probate duty here. The same rule applies to the dividends and interest on the shares and debentures: *Fernandes' Executor's Case* (3); and it is immaterial whether the money to pay the interest and dividends is actually brought to this country and then sent back to America and paid to the American share and debenture holders there, or is kept in America and paid to them there, because the company declare the dividends here, and have the right to make the payment

(1) [1897] 1 Q. B. 738. (2) (1857) 2 H. & N. 339.
(3) (1870) L. R. 5 Ch. 314.

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here, and it is by their orders and for their own convenience that the payment is made in America. When declared the dividends and interest are debts arising in this country and are deemed to be assets locally situate here. Sect. 39 of the Revenue Act, 1862 (25 & 26 Vict. c. 22), affords an illustration of this rule. Sect. 11 of the Revenue Act, 1884 (47 & 48 Vict. c. 62), makes the production of a grant of representation from a court in this country necessary to establish the right to recover or receive any part of the personal estate of a deceased person situate here. The defendant company ought not to have transferred the shares and debenture or paid the dividends and interest except upon production of probate or letters of administration granted in this country. Nothing but the probate or letters of administration with the will annexed, or other proof of the admission of the will in the Probate Division, is legal evidence of the will here: Williams on Executors, 9th ed. p. 242; without which no one can justify intermeddling with the assets situate here. A foreign executor before taking out representation in this country is a mere stranger, and is not recognised as an executor here, and if he intermeddles or deals with the assets of the deceased here he becomes an executor de son tort: Williams on Executors, 9th ed. p. 1827. The defendant company took upon themselves to deal with the testator's assets here at the request of the foreign executors, who were executors de son tort, without requiring them to take out representation here, and by so doing they became executors de son tort. Knowing that the foreign executors did not intend to take out representation here, they helped the foreign executors to dispose of part of the estate. The case is different where an executor in this country, or some one at his request, deals with the assets here and he afterwards takes out probate, for there the subsequent probate makes the previous act lawful: *Brazier* v. *Hudson* (1); *Johnson* v. *Warwick* (2); *Hill* v. *Curtis* (3); *Sykes* v. *Sykes*. (4) This may not be the case with a foreign executor if, according to the law of the testator's domicil, the executors take their title from the probate and not from the will. But where probate is not

(1) (1836) 8 Sim. 67.
(2) (1856) 17 C. B. 516.
(3) (1865) L. R. 1 Eq. 90, at p. 100.
(4) (1870) L. R. 5 C. P. 113.

subsequently taken out the executor, or person acting at his request, cannot justify: *Cottle* v. *Aldrich* (1); *Sharland* v. *Mildon*. (2) Persons who are executors de son tort are executors generally: per Wightman J. in *Paull* v. *Simpson* (3); Williams on Executors, 9th ed. p. 216; and are liable to account for the personal estate of the deceased coming to their hands and to pay probate duty. A foreign executor can obtain probate or letters of administration with the will annexed in this country: *In the Goods of Earl.* (4); s. 73 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77). The defendant company are therefore liable to pay probate duty to the extent of the assets administered by them in this country. The acts of the defendant company also constituted a "taking possession and administering" part of the assets of the deceased here within s. 37 of 55 Geo. 3, c. 184, and they are liable to penalties under that section; and by s. 57 of the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), they must deliver an account and pay such duty as would have been payable if probate or administration had been obtained. The company had control of the shares and debenture, and they took possession of and administered them by transferring them to persons who had no title to them either at law or under the articles of association of the company. So also as to the dividends and interest, inasmuch as they had in their possession an asset of the deceased here and handed it over to persons who had no title to it, they took possession of and administered it within the meaning of the statute. The defendant company also neglected to obtain probate or letters of administration within s. 40 of the Customs and Inland Revenue Act, 1881, and became liable to pay double duty under that section. As this, however, is a test case to determine the question of the liability of the defendant company, the Crown does not press for penalties or double duty.

*Moulton, Q.C.*, and *Asquith, Q.C.* (*A. M. Bremner* and *Gore-Browne* with them), for the defendant company. The Crown is not entitled to duty or penalties in this case. Sect. 37 of 55 Geo. 3, c. 184, specifies the persons who render themselves

(1) (1815) 4 M. & S. 175.
(2) (1846) 5 Hare, 469.
(3) (1846) 9 Q. B. 365, at p. 370.
(4) (1867) L. R. 1 P. & M. 450.

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liable to penalties, namely, those who "take possession of and administer" any part of the estate of the deceased. The test of liability is not whether a person is an executor de son tort, because a person may by his acts constitute himself an executor de son tort though he does not take possession; for example, by sending round a circular and applying for payment of debts due to the deceased, though he fails to obtain payment. The test is whether the person has taken possession and administered. Both must be combined. On the other hand, no one can come within the section who is not an executor de son tort. An executor de son tort implies a dealing with the assets in such a way as denotes an usurpation of the functions of an executor, an assumption of authority which none but an executor can lawfully exercise: per Lush J. in *Peters* v. *Leeder*. (1) That is the class of acts aimed at by the statute. The words "take possession of and administer" refer to acts done in assertion of a right to the deceased's estate. None of the acts done here amount to taking possession and administering. The registration of the transfer of the shares and debenture did not amount to taking possession of and administering the shares and debenture. A company cannot take possession of their own shares. An executor derives his title from the will and not from the probate, and, accordingly, registering a transfer is a mere recognition that the title has passed. The company could not have refused to register the transfer. An executor can before probate bring an action and do almost anything incident to his office: per Montague Smith J. in *Sykes* v. *Sykes*. (2) He can give a discharge for a debt. In this respect executors in New York are in the same position as English executors, as they derive their title from the will. Therefore the recognition of the executors' title to the shares and debenture did not amount to a taking possession within the statute. There was no physical taking possession of anything; it is not necessary that the certificates for the shares should be either produced or handed to the company, nor was it done in this case. Nor did the company by paying the dividends and interest to the foreign executors take possession of or administer

(1) (1878) 47 L. J. (Q.B.) 573, at p. 574. (2) L. R. 5 C. P. 113, at p. 118.

them. They paid a debt due from them to the estate, and an executor may receive payment of a debt before taking out probate: *In re Stevens, Cooke* v. *Stevens*. (1) The company merely paid away their own money, which never formed part of the estate of the deceased. The company paid it at their own risk, and may have to pay it again to the proper persons; but merely paying a debt due to the estate is not a "taking possession" of the debt. The question is not whether the company have got a good discharge for the debt, but whether they are liable to penalties on the ground that the foreign executors have not taken out representation here. If the company had refused to register the transfer and to pay the dividends and interest they could have been sued in New York, and execution levied upon their property there. Sect. 57 of the Crown Suits Act, 1865, does not carry the case further, because the governing words are the same as in s. 37 of 55 Geo. 3, c. 184, namely, "takes possession of and administers."

Next, s. 40 of the Customs and Inland Revenue Act, 1881, does not apply, because the company are not persons "who ought to obtain probate or letters of administration." There must be some duty to take out representation. The company, being debtors to the estate, had no duty to take out representation even if they could have done so. If a person collects debts due to the deceased, he assumes the management of the estate, and must take out representation; but simply paying a debt cannot entail a duty to take out representation. Sect. 39 defines the persons who come within s. 40, and enacts that every person who as beneficiary, trustee, or otherwise acquires possession or assumes the management of any personal property, shall, upon retaining the same for his own use or distributing or disposing thereof, deliver an account of such property. The words "or otherwise" are to be read as indicating persons ejusdem generis with beneficiary and trustee. The defendant company have not brought themselves within any part of that section. The defendant company, therefore, are not brought within any of the statutes, nor are they executors de son tort, and they are not liable to deliver an account and pay duty.

(1) [1897] 1 Ch. 422, at p. 429; [1898] 1 Ch. 162.

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*The Solicitor-General*, in reply. Apart from statute, the Attorney-General can file an information against the defendant company to recover probate duty. In *Attorney-General* v. *Hope* (1) and *Attorney-General* v. *Brunning* (2), informations were filed against executors to recover probate duty, and executors de son tort are in this respect in the same position as executors.

*Cur. adv. vult.*

Dec. 11. A. L. SMITH L.J. read the following judgment:—This is a test case, and it is brought to determine whether an English company limited by shares and registered in England can, upon the death of a foreign shareholder, with impunity transfer into the names of his foreign executors shares and debentures standing in the name of the deceased shareholder in the books of the company, and pay to such executors the arrears of interest and dividends due thereon at the date of his death, without such executors taking out or being about to take out representation to the deceased in this country. That this is the real question which the parties wish to have decided will be seen from the letter of Messrs. Burn & Berridge, the solicitors of the defendant company, of January 10, 1895, to the Comptroller of Inland Revenue. My brothers Wills and Grantham have held that the company can legally and with impunity do this, the case before them having been specially argued as to whether the defendant company by so doing would bring themselves within s. 37 of 55 Geo. 3, c. 184, and become liable to the penalties therein named. This case has been developed in this Court into one very different to what it was in the Court below, the Solicitor-General, who appeared for the Crown, now stating that he did not ask for penalties.

The material facts are as follows: The defendants are an English company limited by shares, incorporated under the Companies Acts, 1862 to 1886, having their registered office in the City of London, where the share and debenture registers are kept. They carry on the business of brewers in America.

(1) (1834) 1 C. M. & R. 530; 2 Cl. & F. 84.
(2) (1859) 4 H. & N. 94; (1860) 8 H. L. C. 243.

Henry Clausen was a share and debenture holder in this company, and was registered as such in their books in London at the date of his death, which took place in America upon December 28, 1893. He was an American citizen, resident and domiciled in that country, and left a will whereby he appointed two gentlemen of New York his executors, to whom letters testamentary of his estate were granted by the Court in New York. Having obtained these letters testamentary, the American executors then requested the defendant company in England to pay to them the interest and dividends due to their testator at the date of his death upon his shares and debentures, and also to transfer into their names the shares and debentures standing in the name of the deceased in the defendants' share and debenture registers in London. The defendants well knew when this request was made that these executors had not taken out, and did not intend to take out, representation in this country to their testator, and that their object was to obtain, if possible, possession of the English assets of their testator without paying probate duty thereon. The defendants with this knowledge paid over to the foreign executors the interest and dividends as requested, which were then in America, and also transferred into their names in the registers in this country one preference and one ordinary share and one debenture, so as to raise the point whether this could be legally done with impunity.

For the main point intended to be raised it should be taken that the interest and dividends were paid to the foreign executors in this country.

Now, first of all, what would have been the position of these foreign executors had they come over to this country and obtained from the defendant company in London payment of the interest and dividends due to their testator at the date of his death, and a transfer of the shares and debentures from his name into their names without having taken out or intending to take out representation in this country to their testator? I cannot doubt that upon receipt in this country of their testator's English assets they would have constituted themselves executors de son tort. They were not and never intended to be executors or administrators in this country of the deceased's assets here,

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but on the contrary intended never to be so, and yet they intermeddled as executors with the testator's goods and chattels in this country in such a way as to constitute themselves executors de son tort.

I see the point is stated thus in Williams on Executors, 9th ed. p. 1827: "It must be observed that if he"—that is, a foreign executor—"should collect the effects or debts of the deceased found or due in England, without taking out letters of administration here, he would thereby become liable as executor de son tort to the extent of the assets so received by him"; and in this I agree. That this would have been the position of these foreign executors in this case when they obtained the English assets of the deceased from the defendant company I do not doubt; and this is so although they did not personally come to this country.

Now these foreign executors being, as I think they were, executors de son tort, how can the defendant company, when called upon in a court of law, justify what they did at the request of the foreign executors in administering the English assets of the deceased? My brother Wills based his judgment upon the ground that, as an executor derives his power from the will and can do many acts before taking out probate and can even sue, which is undoubtedly true, the defendant company could therefore justify administering the English assets of the deceased, as they had acted upon the request of the executors and had handed over to them the assets of their testator, although they had not at that time taken out probate. If the executors were English executors about to take out probate, this ordinarily would be so; but I must point out that, when either an executor has to justify what he has done as executor, or another has to justify what he has done at the request of an executor, each must prove that the executor was in fact the executor of the deceased, and this can only be done by production of the probate, for, as Jervis C.J. pithily put it in *Johnson* v. *Warwick* (1), when the will is proved, the Court has the legal optics through which to look at it; and that this was so was not in reality disputed at the bar.

(1) 17 C. B. 516, at p. 522.

My brother Wills says that what the company have done is simply to pay to the executors, who were persons entitled to receive it, money which belonged to them as executors, which had belonged to the testator, and which upon his decease and upon his will coming into operation became the property of the executors. But in the present case the American will as regards these English assets had no validity whatever in this country, nor had the American executors any right under it to receive the testator's assets here. Until they had taken out representation to their testator in this country, they were pure strangers to the English assets. This American will, to the knowledge of all parties, was never to come into operation as a will in this country; the American executors were never to become executors in this country, it being the express intention of all parties that they should not. This is not the case, as put in argument, of a debtor of a testator paying a debt, due from him to that testator, to the executor named in his English will before that executor has proved the will, but it is a case in which the payment is made to a person who has no legal right to receive it, with knowledge that that person would never become legally entitled to receive it. The judgment of Wigram V.-C. in *Sharland* v. *Mildon* (1), and that of Wood V.-C. in *Hill* v. *Curtis* (2), in my opinion, shew that, even if there was not such knowledge, the defendant company by what they did were executors de son tort.

It cannot be successfully contended that an executor de son tort is any less liable to pay probate duty upon the assets of a testator which he has administered than he would have been if he had been a named executor in a will. Without being executor he has intermeddled with the deceased's estate as if he were executor so as to constitute himself executor de son tort; and, as Wightman J. in *Paull* v. *Simpson* (3) says, a person who is executor de son tort is executor generally. I find in Mr. Hanson's book on the Probate, Legacy, and Succession Duty Acts, edition of 1870, p. 66, this passage: "Those who receive and administer the property of the deceased either

(1) 5 Hare, 469.

(2) L. R. 1 Eq. 90, at p. 100.

(3) 9 Q. B. 365, at p. 370.

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as original or as derivative executors . . . . or as administrators of his effects or even as executors de son tort, are the persons primarily liable to account for and pay the duty." Although this work is not an authority in a court of law, I have no doubt that that passage is correct. In my opinion, in the circumstances stated, the defendant company were executors de son tort, as also were the foreign executors. The defendants' case really comes to this, that one executor de son tort, when challenged in a court in this country to justify what he has done in relation to the administering of a deceased's estate, can do so if he can shew that he has acted under the directions and at the request of another executor de son tort. This cannot be, and it is not surprising that no authority has been produced to support such a proposition.

The defendant company, having constituted themselves executors de son tort, and thus become debtors to the Crown for probate duty, it is argued that, even if so, there is no way by which the Crown can obtain from the defendants the duty payable to it, that is, the duty payable upon the English assets of the testator administered by them. Elaborate arguments were addressed to us upon the question whether the defendant company were liable to the penalties imposed by s. 37 of 55 Geo. 3, c. 184; but that is not the point now sought to be determined, the Solicitor-General not asking for penalties. The question is whether by any proceedings by the Crown against the defendants they can be made to pay probate duty to the Crown.

In my judgment, it is open to the Attorney-General to file an information against the defendant company asking that it may be declared that a debt arose and became payable to Her Majesty in respect of probate duty upon the amount of the English assets which were in this country at the date of the death of the deceased, and which the defendants have administered, and that it is no answer to such an information to say that they were only executors de son tort. In this proceeding the defendant company will have to justify what they have done, and they cannot do so without producing probate or letters of administration with the will annexed or other repre-

sentation taken out by the American executors of the deceased in this country. It is true that the person liable to pay probate duty has to swear an affidavit and obtain a stamp of the requisite value to be affixed thereon, and by this means he is to pay the probate duty; but this is mere machinery by which the duty is to be paid. The person who is liable to pay probate duty and does not do so is a debtor to the Crown, and it is no answer for him to say his only liability is to swear an affidavit and procure a stamp. Even if this were an answer, which I think it is not, I do not see why the prayer of the information should not be framed to meet it. That proceedings by way of information to recover probate duty will lie is established by precedents, and even if not I can see no valid reason against it. In the year 1831 (tempore Sir James Scarlett, A.-G.) I find an information to recover probate duty was filed in the case of *Attorney-General* v. *Dimond*. (1) In the year 1834 (tempore Sir John Campbell, A.-G.), in the case of *Attorney-General* v. *Hope* (2), like proceedings were had, and this case went to the House of Lords thereon. (2) Again, in 1859, Sir Fitzroy Kelly, when Attorney-General, filed an information for the same purpose: see *Attorney-General* v. *Brunning* (3); and this case also went to the House of Lords. (4) I cannot doubt that proceedings by way of information by the Attorney-General can be taken to recover unpaid probate duty.

What I have written above answers the real point raised in this case in favour of the Crown, namely, that it is not lawful for the defendant company to do what they have done, and that they can be made liable to pay probate duty upon the assets which they have administered in this country. If it is to be taken that the interest and dividends in this case were paid in America, and not here, I think the same result follows, and the reason for this will be found in the judgments about to be delivered by my brothers Rigby and Collins.

It is unnecessary, in the view I take of this case, to decide whether the penalties imposed by s. 37 of 55 Geo. 3, c. 184, can be recovered. The Solicitor-General does not ask for them;

(1) (1831) 1 C. & J. 356.
(2) 1 C. M. & R. 530; 2 Cl. & F. 84.
(3) 4 H. & N. 94.
(4) 8 H. L. C. 243.

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but had I to decide thereon, I should agree, though I doubt whether it is open to me to disagree in this Court, with the judgment of Giffard L.J., in *Fernandes' Executor's Case* (1), which judgment has an important bearing upon this case in favour of the Crown. Nor have I to decide whether s. 57 of the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), or ss. 39 and 40 of 44 & 45 Vict. c. 12, can in the circumstances of this case be resorted to.

For the above reasons, in my judgment, the Crown succeeds in this appeal, which must be allowed, with costs here and below.

RIGBY L.J. read the following judgment:—By English law, with which alone we are concerned in this case, probate duty is payable in respect of all assets of a deceased person, whether domiciled or resident within this country or not, which are within the meaning of the numerous decisions on this point locally situated in England. The authorities shew that for this purpose the following are treated as local assets subject to probate duty. (*a*) Any choses in action which are incapable of being effectually transferred without some act being done in this country. This would include shares and debentures of a limited company incorporated in England, transfers or transmission of which must, as in the present case, be completed by entries made in this country in a register of members or a register of debenture-holders. (*b*) Any debts payable by debtors in this country, including incorporated companies which, as in the present case, are registered, managed, and controlled here. Dividends on shares in the case of the defendant company have to be declared by a general meeting of the company held here, or as to interim dividends by the board of directors acting here, and when declared can only be recovered as debts due from the company. Interest on debentures can only be recovered as a debt due from the company, and in the present case there are express provisions making the interest payable in London.

There can be no doubt that, if representation to a deceased person were taken out in this country, the personal representa-

(1) L. R. 5 Ch. 314.

tive here would be chargeable with probate duty in respect of all these assets so far as the interest of the deceased extended. In the regular course the probate duty is chargeable as a stamp duty on an affidavit made for the purpose of the grant of probate or letters of administration. But if it were possible to evade the duty by omitting to take out representation to the deceased, the imposition of the duty would in many cases be a vain thing. Accordingly, it is upon authority plain that the duty is payable by a person who takes upon himself to deal with assets even though he do so as an executor de son tort only. Any person who may be entitled to administration here, including the representative in the country of the deceased's domicil, if he does not make himself personal representative here, becomes on intermeddling with the assets here executor de son tort and chargeable as such with probate duty. Any person intermeddling with the assets under the direction of an executor de son tort, whether he be a foreign representative or not, is himself chargeable as an executor de son tort. It makes no difference that the foreign representative is named as executor in the will by virtue of which he is made representative abroad. That will cannot be looked at or given in evidence until representation is taken out here, and the maxim "De non apparentibus et non existentibus eadem est ratio" will apply.

We are asked to decide here that the defendant company and other like companies may, without becoming liable to the Crown for probate duty, lawfully concur in transferring choses in action which cannot be effectually transferred without an act done here, namely, the shares and debentures of the deceased, and pay the dividends and interest on the shares and debentures to persons who cannot be recognised by our law as representatives of the deceased, and on the hypothesis never intend to be representatives here. In my judgment, the defendant company can do none of the things suggested without making themselves liable to the Crown for probate duty—liability which may, independently of any question of penalties or special remedies given by the Crown Suits Act, be enforced by information against them.

It is suggested that by paying the dividends and interest

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abroad the company may evade liability. Whether the payments be made abroad out of money transmitted for the purpose, or out of money of the company which happens to be abroad, makes, in my judgment, no difference. They are equally payable by the order and direction of the company, and the payment is the act of the company whereby a chose in action of the company locally situate here within the meaning of our law is dealt with so as to constitute the company executor de son tort.

It was further suggested that the Courts in New York would enforce payment there of the full amount of the dividends and interest regardless of the fact that they are chargeable, and that the payment of them would make the company chargeable with probate duty in England. I am very far from being satisfied that this would be so; but if it were the case, however much it might be regretted, I do not think that we are bound, and I do not feel inclined to decide that it would affect the Crown's right to duty.

As this case is brought before the Court for decision on a state of facts raised for the purpose of determining a general principle, it would be out of the question for the Crown to exact penalties, and no such claim has been made, though it has been argued that they would be payable, and the information which by agreement was substituted for a special case for the purpose of raising the general question is so framed as to raise the abstract question of penalties.

It does not appear desirable to decide anything more than is necessary for determining the real point submitted to us; but without deciding any abstract question as to penalties, I may say that for my part it would require very different grounds from any that have been brought before us to lead me to the conclusion that the decision of Giffard L.J. in *Fernandes' Executor's Case* (1) would not be applicable.

I do not think it relevant to inquire whether, as between the executors named in the will and the defendant company, the transfers and payments might not be valid and sufficient to relieve the company from liability. They could have no such

(1) L. R. 5 Ch. 314.

effect as against the Crown or any other claimants entitled to payment out of the English assets.

In conclusion I would add that, if the arguments of the defendant company were to prevail, I see no reason why foreign executors, who did not wish to sue in this country, should ever pay probate duty on assets here. They would only have to get some one here to collect and transmit to them all the assets here, and there would be an end of the matter. Indeed, that appears to be the precise argument of the defendants in this case.

COLLINS L.J. read the following judgment:—I agree in the result of the judgments delivered, and, without recapitulating the facts, will shortly state my reasons. I think it cannot be doubted on the facts admitted that the defendant company have taken upon themselves to deal with the English assets of a deceased person. Indeed, subject to the question whether they ever took possession or not, Wills J., in the Court below, thought that they had done so. He says that if they took possession they certainly administered, because if they took possession they dealt with the property. By an act which could only be done by them in London, and without which no transfer would have been complete, they effected a change in the legal evidence of the title to one ordinary share, one preference share, and one debenture in the company by transferring them in the registers into the names of the American executors. They also paid to the executors out of England dividends on shares and interest on debentures, which latter at all events was, by the terms of the debentures themselves, payable in London. They did all this knowing that the persons to whom they so transferred and paid, though in fact named as executors in the will of the deceased in America, had no intention of taking out probate in this country, and they were willing to assist them as far as they could in avoiding the necessity of doing so. This appears to me clearly to amount to such an intermeddling with the English assets of the deceased as to constitute the defendant company an executor de son tort, unless the fact that these acts were done under the authority

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of the executors named in the American will can make a difference.

I agree that there is a broad distinction between acts done by or under the direction of a mere intruder not named in the will and acts done by or under the authority of a named executor. The latter taking title under the will is not in fact a tortfeasor, neither is any one acting under him, and for certain purposes this distinction may be material. But if the acts of the persons who have dealt with the assets are challenged, as they now are by the Crown, and their rights have to be ascertained in a court of law before probate is taken out—and a fortiori if it was never intended to be taken out—there is no material difference between the position of the mere intruder and his agents and the executor and his agents. They are each estopped by their acts, whether tortious or innocent, from denying that they are executors, and as they cannot prove probate they make themselves liable to probate duty in respect of the assets which they have administered. The distinction is pointed out by Montague Smith J. in *Sykes* v. *Sykes* (1); see also *Hill* v. *Curtis*. (2) It is immaterial in this view whether they are named in the will or not, as the Court cannot be informed upon this fact except through the medium of probate. The head-note of *Sykes* v. *Sykes* (3) is misleading. There Shaw had been manager of certain works which had been carried on by a deceased person. After her death he at the request of her executors, who had not proved her will, continued to manage the works and to deal with the property. Judgment was obtained against him as executor de son tort by a creditor of the deceased, and execution was levied on "the goods in his hands as executor to be administered." The executors afterwards took out probate and brought trover against the execution creditor and the sheriff, and it was held that they were entitled to judgment as the agent of a rightful executor was not a tortfeasor in obeying their orders. Here, probate having been taken out before the executors' action, the Court was able to see that they were executors, and as such

(1) L. R. 5 C. P. 113, at p. 118. (2) L. R. 1 Eq. 90.
(3) L. R. 5 C. P. 113.

capable of justifying the acts of Shaw, which consequently were not tortious; but the case is far from deciding that had the executors not taken out probate before action the acts of Shaw could have been treated as other than tortious. In contemplation of the Court he must have been a wrongdoer if he could not prove that he had the authority of the executors.

If I am right in holding that the defendant company did intermeddle with the English assets of the testator by the acts above stated, the case of *Fernandes' Executors* (1) is exactly in point. There the deceased, who was domiciled in India, was a creditor of an English bank which carried on business in India. The company was wound up, and the deceased had proved his debt and received a dividend before his death. He died in India, and his will was proved there. The Indian assets of the bank had been remitted to the official liquidator in England. A final dividend became payable after the death of the creditor, and the Indian executors were desirous of receiving it without taking out probate in this country. The liquidator took the opinion of the Court whether he would be justified in remitting the amount to India or paying it to an attorney here for the executors. Giffard L.J., overruling Lord Romilly M.R., held that he could not do so, and expressed an opinion that the person who so received and administered the assets would be liable to a penalty under 55 Geo. 3, c. 184.

I agree with my Lord that, as the Crown are not claiming a penalty under the latter statute, the real question is whether the defendant company are liable to pay duty, and I have no doubt that an information would lie against them for not doing so. This point does not seem to have been argued in the Court below. But I am further of opinion that the processes of transferring the title to the shares and debenture in the registers from the deceased to the executors and paying the interest and dividends did involve a "taking possession" of these assets within the meaning of the statute. If the operation had been carried out in the ordinary way, there must have been a physical taking possession of the documents of title, and even though this step was advisedly omitted in this case, I think there was

(1) L. R. 5 Ch. 314.

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a constructive taking possession involved in the alteration of the registers and the payment of interest and dividends. The interest and dividends as well as the shares and debentures formed part of the estate of the deceased in England, being debts due from an English company and payable in England: *Attorney-General* v. *Higgins* (1), *Attorney-General* v. *Bouwens* (2), and *Attorney-General* v. *Hope* (3); and I think that the company cannot by paying them in America escape from the position of having appropriated in their hands, and therefore taken possession of, English assets of the deceased when they paid these sums for interest and dividends.

*Appeal allowed.*

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Burn & Berridge.*

E. L.

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1897 *Dec.* 14, 15.

THE WEST LONDON SYNDICATE, LIMITED, APPELLANTS; THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

*Revenue—Stamp—Conveyance on Sale—Agreement for Sale—Ad valorem Duty—Leasehold Interest in Licensed House—Goodwill—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1.

By s. 59, sub-s. 1, of the Stamp Act, 1891, "any contract or agreement made in England or Ireland under seal, or under hand only . . . . for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments or heritages . . . . or goods wares or merchandise . . . . shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

By an agreement under seal the vendor agreed to sell the goodwill of the business of an hotel proprietor and licensed victualler, and the lease of the hotel in which the business was carried on, together with the household furniture, stock-in-trade, cash, and book debts; of the total consideration 4085*l.* was apportioned to "lease and goodwill," 1462*l.* to furniture, stock-in-trade, and cash, and 37*l.* to book debts. The vendor

(1) 2 H. & N. 339. (2) (1838) 4 M. & W. 171.
(3) 1 C. M. & R. 530; 2 Cl. & F. 84.

was to shew a good title to the lease and to assign the lease and goodwill to the purchasers; in the event of the consent of the landlords to the assignment of the lease not being obtained, it was provided that the vendor should, at the option of the purchasers, execute a declaration of trust of the leasehold premises in their favour. The consent of the landlords not having been obtained, a declaration of trust was executed in favour of the purchasers, which was stamped with the fixed duty of 10*s*.

*Held*, (1.) that the agreement was not an agreement for the sale of an equitable interest in property within the meaning of s. 59, sub-s. 1; (2.) that, inasmuch as the goodwill was incapable of being severed from the enjoyment of the leasehold premises, the instrument was not an "agreement for the sale of an estate or interest in any property except lands," and was therefore not liable to ad valorem duty upon that portion of the consideration attributed to "lease and goodwill"; (3.) that it was liable to ad valorem duty upon the amount of the book debts only.

CASE stated by the Commissioners of Inland Revenue pursuant to 54 & 55 Vict. c. 39, s. 13.

The instrument presented for the opinion of the commissioners was an agreement under seal dated March 19, 1895, for the sale by Percy Thorne to the appellants of, firstly, the goodwill of the business of an hotel proprietor and licensed victualler carried on by the vendor on premises thereinafter mentioned, and the full benefit of the victualler's and other licences, and of all contracts, engagements, and privileges to which the vendor was entitled in relation thereto; secondly, the lease of a certain hotel and premises and the vendor's right, title, and interest therein, subject to a yearly rent, together with the policy of insurance against fire; thirdly, all the household furniture, fixtures, fittings, and other effects (other than stock-in-trade) in and upon the premises belonging to the vendor and the benefit of the policy of insurance against fire then subsisting therein; fourthly, the stock-in-trade to which the vendor was on the previous November 17 entitled in relation to the business of an hotel proprietor and licensed victualler carried on by him upon the said premises; fifthly, all cash in hand and at the bank to which the vendor was entitled at the said date; and sixthly, all the book and other debts due to him in connection with the said business.

By clause 2 it was provided that the consideration for the sale should be the payment, satisfaction, and discharge by

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the appellants of the debts and liabilities of the vendor due and owing by him at the said date in relation to the said business, and the sum of 4250*l.*, of which 1462*l.* 16*s.* 3*d.* was the apportioned consideration for the furniture, stock-in-trade, and cash.

By clause 3 it was provided that the vendor should shew a good title to the leasehold premises and well and effectually assign to the appellants or their assigns the lease thereof and the goodwill of the business. Clause 6 provided that in the event of the consent of the landlords to the assignment of the leasehold premises not being obtained the vendor should, at the option of the appellants, execute a declaration of trust of the leasehold premises in their favour.

The commissioners were informed that the amount of debts and liabilities, forming part of the consideration under clause 2, was the sum of 1335*l.* 8*s.* 4*d.*, and that the purchase consideration was therefore that amount plus 4250*l.*, namely, 5585*l.* 8*s.* 4*d.*, and that this total sum was arrived at in the following manner :—

| | £ | *s.* | *d.* |
|---|---|---|---|
| For lease and goodwill . . . . . | 4085 | 8 | 4 |
| Household furniture, &c. . . . . | 1260 | 0 | 0 |
| Stock-in-trade. . . . . | 100 | 0 | 0 |
| Cash at bank . . . . . | 102 | 16 | 3 |
| Book debts . . . . . | 37 | 3 | 9 |
| | 5585 | 8 | 4 |

and that it was quite impossible to sever the goodwill from the lease itself, because the goodwill was considered to be of no value as it could not exist apart from the lease, but that without a covenant restricting the vendor from carrying on business the lease would be of less value by 400*l.* to 500*l.*

The commissioners called for the production of any assignment of the leasehold premises which might have been executed, and a declaration of trust dated March 21, 1895, by which the equitable interest in the leasehold premises became vested in the appellants was produced. No part of the consideration was expressed by the declaration of trust as being apportioned to

the leasehold premises, and that deed was not stamped with ad valorem duty on 4085*l.* 8*s.* 4*d.*, but was stamped only with the fixed duty of 10*s.*

The commissioners having regard to the provisions in ss. 5 and 15 of the Stamp Act, 1891, were of opinion that, inasmuch as neither the sum of 4085*l.* 8*s.* 4*d.* nor any other part of the consideration had been expressed by the declaration of trust to be apportioned to the leasehold premises so as to make that instrument chargeable according to its terms with ad valorem duty as a conveyance on sale, the whole consideration, except the sum of 1462*l.* 16*s.* 3*d.* apportioned as the consideration for the furniture, stock-in-trade and cash, was to be regarded as applicable to the other property sold under the agreement. They were, therefore, of opinion that the agreement was chargeable under s. 59, sub-s. 1, of the Stamp Act, 1891, with ad valorem conveyance duty on the sum of 5585*l.* 8*s.* 4*d.*, less the sum of 1462*l.* 16*s.* 3*d.* apportioned as aforesaid, making the net sum of 4122*l.* 12*s.* 1*d.* They accordingly assessed the ad valorem stamp duty of 20*l.* 15*s.* upon the agreement, being the ad valorem duty of 5*s.* for every 50*l.* of the said sum of 4122*l.* 12*s.* 1*d.* payable under the head "Conveyance or Transfer on Sale" in the first schedule to the Stamp Act, 1891, and they also assessed the fixed duty of 10*s.* in respect of the agreement for the sale of the leasehold premises, furniture, stock-in-trade, and cash.

The questions for the opinion of the Court were whether the instrument was chargeable with the ad valorem duty of 20*l.* 15*s.* in accordance with the assessment of the commissioners; and, if not, with what amount of ad valorem duty it was chargeable. (1)

*Lawrence*, Q.C. (*Spearman* with him), for the appellants. This instrument is liable to ad valorem duty upon the amount of the book debts only, together with the fixed duty of 10*s.* upon the agreement for sale of the lease. Except as to the

(1) It was stated in the course of the argument that after the decision of the commissioners a conveyance of the legal interest in the property sold had been executed and stamped with an ad valorem stamp.

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amount of the book debts the agreement is not liable to ad valorem duty, because it does not come within s. 59, sub-s. 1, of the Stamp Act, 1891, which section alone makes agreements as distinguished from conveyances subject to ad valorem duty. That sub-section deals with agreements for the sale of an equitable estate or interest in any property whatsoever, and with agreements for the sale of a legal estate in any property with the exception of lands, tenements, hereditaments, and heritages. This is not an agreement for the sale of an equitable interest, for there is no contract by the purchaser to purchase such an interest. It is an agreement for the sale of a legal interest in a contingency that had not happened and might never happen, and, being so, it comes within the exception in the sub-section as being an agreement for the sale of the leasehold interest in a licensed house. To obviate this difficulty the commissioners have attributed the whole of the sum of 4085*l.* 8*s.* 4*d.* to goodwill alone, but under the circumstances the goodwill is not "property except lands" within the meaning of s. 59, sub-s. 1. The goodwill of a licensed house is attached to the premises themselves and cannot be severed from the enjoyment of them; an assignment of the premises carries the goodwill with it. This is the only goodwill which the purchasers get under this agreement; they do not get what may be called the personal goodwill of the vendor, for there is nothing to prevent his setting up in business next door if he so chooses. There is nothing in the agreement to shew that the parties treated the goodwill as having a separate and independent value apart from the premises. [He cited *Ex parte Punnett, In re Kitchin* (1); *Chissum* v. *Dewes* (2); *King* v. *Midland Ry. Co.* (3); *Inland Revenue Commissioners* v. *Glasgow and South Western Ry. Co.* (4); *Potter* v. *Inland Revenue Commissioners* (5); *Inland Revenue Commissioners* v. *Angus.* (6)]

*The Attorney-General* (*Sir R. E. Webster, Q.C.*), (*Danckwerts* with him), for the respondents. The instrument was properly chargeable with ad valorem duty under s. 59 on the amount of

(1) (1880) 16 Ch. D. 226.
(2) (1828) 5 Russ. 29.
(3) (1868) 17 W. R. 113.
(4) (1887) 12 App. Cas. 315.
(5) (1854) 10 Ex. 147.
(6) (1889) 23 Q. B. D. 579.

the consideration attributed to "lease and goodwill": it was either an agreement for the sale of an equitable interest in the lease, or it was an agreement for the sale of the goodwill. Upon the facts the commissioners were bound to assume that the lease as a lease was of no value, and to attribute the whole of the consideration to the goodwill. It is clear from clause 6 of the instrument that it was an agreement for the sale of an equitable interest in land, for it was contemplated that the landlords' consent might not be obtained, and that the vendor might, at the option of the appellants, execute a declaration of trust in their favour. The goodwill is in effect an enhancement of the value of the leasehold property of which the equitable interest was contracted to be sold; if that, however, is not the true way of regarding it, the agreement must be treated as being an express bargain for the sale of the goodwill. If the instrument is an agreement for the sale of the goodwill, s. 59 places it for revenue purposes on the same footing as a conveyance of the goodwill, and it is clear from the judgment of Lindley L.J. in *Inland Revenue Commissioners* v. *Angus* (1), that a conveyance of the goodwill of a business is liable to ad valorem stamp duty.

*Cur. adv. vult.*

1897. Dec. 15. GRANTHAM J. I am of opinion that our judgment must be in favour of the appellants. The question we have to determine is whether or not this agreement amounted to a conveyance or an assignment of an equitable interest in the leasehold premises and goodwill of a certain hotel in the West End, as was contended by the respondents. As I understood the argument, they admitted that if the agreement merely dealt with the leasehold interest in the property itself apart from goodwill, they could not justify the imposition of an ad valorem duty; but they contended that they were entitled to the full duty which they had charged on the ground that it was in effect an assignment of the equitable interest or an assignment of the goodwill. They relied to a very considerable extent on the case of *Potter* v. *Inland Revenue*

(1) 23 Q. B. D. 579, at p. 596.

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*Commissioners* (1); but I do not think that that case in any way helps them, because it was decided simply on the question whether or not the goodwill, independently of anything else, was the subject of sale; I should think that prior to that decision there could not have been very much doubt that goodwill was the subject of sale. In that case that was the whole question raised: certain gentlemen had been partners for a considerable time in a very valuable business of paper makers and paper stainers, and one of them wished to leave the business and sell his interest in it, and it was agreed that one of the partners should pay to the other 20,000*l.* for the purchase of his interest in the goodwill of the business. Now, the document in that case was a conveyance for the sale of that goodwill, and unless on that amount the duty was to be paid, no duty would have been paid on goodwill at all. As far as I understand the ratio decidendi of that case, what was held was that the goodwill was the subject of the sale, and that the instrument which carried out the sale between the parties was liable to ad valorem duty. Indirectly it seems to me that that case is an authority against the Crown, because it shews that it really is the instrument that is liable to duty and not the property or the mere bargain. There may be a bargain between people for the sale of property, but unless it is necessary to carry out that bargain by the aid of an instrument no duty is payable.

How then can it be said that an instrument which is not a conveyance, an instrument by which the property does not vest in the purchaser, is liable to ad valorem duty, when it is manifest that the instrument is merely something leading up to the preparation of another document by which the sale is ultimately carried out? Now, does this agreement amount to a conveyance for sale, or is it merely an agreement between the parties setting out what they are agreed upon, and what they are going to do in the future? If they are setting out what they are going to do in the future by this agreement—what they are going to convey in the future—it is manifest from the language of the Stamp Act that it is the instrument by which the property is ultimately conveyed which is liable to

(1) 10 Ex. 147

the duty, and unless the Crown can shew that this instrument amounts to a conveyance of an equitable interest, it is not liable to the ad valorem duty which is claimed. It seemed to me that the argument for the Crown rested almost entirely on the fact that upon the declaration of trust, which was subsequently made, only a 10*s.* duty was put by the parties to this agreement; but we cannot interpret one document by the absence of the stamp duty on another; it may be the declaration of trust was wrongly stamped; but we are not concerned with that. I think a very strong argument might be used to shew that it was wrongly stamped; but I give no decision on that point because it is not before us. But the learned Attorney-General was obliged to rely on the omission of the contracting parties to put any other than a 10*s.* stamp on that document as a reason why it must have been intended when this agreement was made that it should be treated as the sale of an equitable interest.

Let us look for a moment at this instrument and consider its language: "The vendor shall sell and the syndicate shall purchase, firstly, the goodwill of the business," and secondly, thirdly, fourthly, and so on. Now, is this a sale? Is this the document by which the transfer takes place and the property vests in the purchasers? Clearly not. What does the second paragraph say? "The consideration for the said sale shall be the payment in satisfaction"—not "is," but "shall be"—that is to say, a payment in satisfaction is to be made in the future. The third paragraph says: "The vendor shall shew a good title." If a good title is not shewn, the whole of this agreement goes to the wall, and it is mere waste paper; it is manifest, therefore, that this was not a sale. The fourth paragraph says: "The syndicate shall accept such assignment of the lease"; this document, therefore, is not an assignment; and so it goes on from beginning to end, including the sixth clause, which was the main clause on which the Crown relied. But what do we find there? Why, that, the leasehold premises being only assignable with the consent of the landlords, "the vendor shall use his best endeavours," &c. Something is to be done, and the Crown contends that because something is to be

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done thereafter, which was partly or temporarily done afterwards, therefore they are entitled to hark back to the original execution of this document, and say that this is a sale. It seems to me there is a fallacy in saying that this is the instrument by which the sale is completed.

Then let us turn for a moment to the case of *Inland Revenue Commissioners* v. *Angus* (1), where the agreement was for the sale of certain premises with a business and goodwill, very much as it is in the present case, which deals with the sale of the goodwill and the leasehold interest. In his judgment Hawkins J. says (2): "Now there are one or two sections (apart from the authority which I am going to cite) to which our attention was called, which seem to me to have a considerable bearing on the matter. The first is s. 74, sub-s. 4: 'Where a person having contracted for the purchase of any property,' which is this case, 'but not having obtained a conveyance,' which is this case, 'contracts to sell the whole or any part or parts thereof to any other person or persons, and the property is in consequence conveyed by the original seller to different persons in parts or parcels, the conveyance of each part or parcel is to be charged with ad valorem duty in respect only of the consideration moving from the sub-purchaser thereof, without regard to the amount or value of the original consideration'"; shewing, therefore, that it is a subsequent document which is to have the stamp duty impressed on it. So far as I understand the facts of the present case, effect has been given to that by a subsequent conveyance, on which, as I understand, ad valorem duty has been paid; but that, again, is not before us. Then the same learned judge says (3): "I have already stated that in our judgment the agreement does not operate as a transfer, either legally or equitably, of the property comprised therein, although no doubt it would confer upon the purchaser a right legally and equitably to have such a conveyance made, in the event of all the conditions precedent being fulfilled on the day, or before the day, on which the conveyance was to be finally settled." Turning to the judgment of the Court of Appeal,

(1) 23 Q. B. D. 579. (2) 23 Q. B. D. at p. 584.
(3) 23 Q. B. D. at p. 585.

Lord Esher M.R. says (1): "Now the property which was to be conveyed in the present case is a legal property. I have no doubt that the goodwill of a business is 'property' within the meaning of the section. It is always treated as property between a purchaser and a seller, and it is a legal property. Then the question is, whether the instrument which we have now to consider is an instrument 'whereby' (that is, by the instrument itself alone) the property in the goodwill is conveyed. The instrument does not relate to the purchase and sale of the goodwill alone; it deals with the purchase and sale of certain premises and of the goodwill of the business which has been carried on there. But for the purpose of founding the argument which has been presented to us, the goodwill has been separated from all the other matters, and the instrument has been treated as if it related merely to the purchase and sale of the goodwill, and not to the purchase and sale of the premises to which the goodwill has been attached. I think it has hardly been argued that this instrument is in terms a 'conveyance.'" Now that is exactly what has been done here; the instrument has been treated as if it were a sale only of the goodwill, whereas it is an agreement to transfer the premises and the goodwill of the business. Then, again, later on Lord Esher says: "It would be a contradiction of terms to say that that which requires a decree for specific performance is in itself a 'conveyance' which has conveyed the property to the purchaser." Lindley L.J., the present Master of the Rolls, says (2): "The Inland Revenue Commissioners are not now contending that a conveyance of real property has been insufficiently stamped by reason of an increased value which the goodwill of a business gives to such property. The controversy now before us is not similar to that which was before the House of Lords in *Inland Revenue Commissioners* v. *Glasgow and South Western Ry. Co.* (3) It will be time enough to deal with that question when it arises. The commissioners are insisting that this instrument, which on the face of it is a mere agreement, ought to be stamped, at any rate so far as the goodwill is concerned,

(1) 23 Q. B. D. at p. 590. (2) 23 Q. B. D. at p. 594.
(3) 12 App. Cas. 315.

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with the ad valorem stamp applicable to a 'conveyance.' But any conveyancer, any lawyer, would see in a moment that this is not a conveyance at all. It is an agreement, which is a totally different thing." Then again he says, and I adopt his language (1): "What I am now saying is in no way inconsistent with *Potter* v. *Inland Revenue Commissioners* (2), where it was held that upon a conveyance of the goodwill of a business the instrument should be stamped with an ad valorem stamp. That case only shews that if people choose to convey real estate by one deed and goodwill by another, and to apportion the whole consideration between them, the commissioners would get the proper stamp duty, partly upon the conveyance of real estate and partly upon the conveyance of the goodwill. But that decision does not affect the distinction between a contract and a conveyance, nor shew that the commissioners can insist upon every contract for the sale of property being stamped with an ad valorem stamp as if it were a conveyance, though it may be true that one of the parties to the contract acquires under it equitable rights which in a certain sense may be described as 'property.'" Therefore it seems to me not only on principle but also on authority that the commissioners have in this case done that which they ought not to have done, namely, made the parties pay an ad valorem stamp on the whole value of the property including goodwill, ignoring altogether the fact that the property may be more valuable than the goodwill, or that the goodwill without the property may be worth nothing at all. With regard to the book debts there is no question: they are once and for all sold, as it were, by this document, and it is quite right that duty should be paid on them. But with regard to the other part of the case, there is nothing to shew that the property was to be transferred by this instrument, and the mere fact that under clause 6 the vendor has at the request of the syndicate for the time being made a declaration of trust does not change the character of the document from what it originally was, or make it the operating document whereby the property was conveyed to the purchasers. For these reasons I think that the commissioners were wrong, and that the appellants

(1) 23 Q. B. D. at p. 596. (2) 10 Ex. 147.

must succeed, and our answer should be that the instrument is not chargeable with the ad valorem duty of 20*l.* 15*s.* in accordance with the assessment of the commissioners, but that ad valorem duty is chargeable on the book debts.

CHANNELL J. In this case I have had a good deal of doubt about several of the points that have been raised, but on the whole I have come to the same conclusion as my learned brother. I think, however, that it is necessary that I should state my reasons, which are similar, though I am not quite sure that they are the same as he has given.

In the first place I think it is clear that this document is in fact a contract for a conveyance, not the conveyance itself. The result of that appears to be that it is not chargeable with ad valorem duty under any other section of the Stamp Act than s. 59. But that section does relate to contracts and agreements which are not sales but which are contracts for future sales; so that in substance the question for our consideration is the construction of that section. Now, s. 59 provides for ad valorem duty in certain cases of contracts for sales which are not conveyances, and the cases in which it provides for the imposition of an ad valorem duty are where the contract is for the sale of an equitable interest, or where it is for the sale of any property except lands and tenements, speaking shortly; so that the question which we have to decide is whether this agreement comes under either of these branches.

Now the first question is, was it an agreement for the sale of an equitable interest? I was for some time inclined to think that it was, but on a more careful consideration it seems clear that it was not, because, although the possible sale of an equitable interest is contemplated, there is no contract by the purchaser to purchase such an interest. It is a contract to convey the legal interest with a term superadded that if the legal interest cannot be conveyed by reason of the lessor's assent to the assignment not being obtained, then the purchasers are to be at liberty to take, but are not bound to take, the equitable interest, and in that case if they like they are to have a

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declaration of trust. Consequently it seems to me that, although the vendor has undertaken that if the purchasers like he will, if he cannot give the legal interest, give them the equitable interest, yet the purchasers have not contracted to take an equitable interest, and consequently it cannot be said to be a contract for the sale of such an interest. Sale is correlative with purchase: there is no contract for sale unless the purchaser agrees to buy whilst the vendor agrees to sell; if the vendor merely agrees to sell and the purchaser does not agree to buy, it is merely an offer and not a contract of sale. Consequently I think this is not a contract for sale of an equitable interest, and I think it cannot be made so because subsequently an equitable interest was in fact conveyed pursuant to it. The document must be interpreted by what it is in itself, and it is not a contract for the sale of an equitable interest but a contract for the sale of a legal interest plus a term that if the legal interest cannot be conveyed the purchaser may at his option, but only at his option, take an equitable interest; it does not, therefore, come under that branch of the section.

The next question is, does it come, or does any part of the matters agreed to be sold come, under the second branch? That is to say, is it a contract for the sale of any estate or interest in any property except lands or goods? Now, the question as to that turns upon whether the goodwill, which it is agreed is of substantial value in this case, can be said under the circumstances to be "property except lands." Now, goodwill is of course a thing of very ambiguous character. The goodwill of a partnership, where the advantage that is called goodwill attaches to the name of the firm or to the person or individuals who carry it on, undoubtedly would be property other than land. But in the case of a public-house there is nothing, I think, that could be called goodwill that could in any way be severed from the enjoyment of the land. It is attached to the possession of the land: it is not necessarily attached to the lease; there may be a lease, and there may be an underlease and so on, but the only person who can get the benefit of the trade of a public-house, which is what the goodwill really means, is the person who is entitled to the possession of the

premises; the goodwill is in point of fact an additional value of the premises by reason of the opportunity of earning trade profits in them in consequence mainly of their being a licensed house. That is what the goodwill of a public-house is: it is an addition to the value of the land; and I do not think that, apart from the way in which it is treated by the parties, it would be possible to say that that goodwill is "property except lands."

Assuming that to be so, the question arises whether in the form of this document the parties have in fact treated the goodwill as something separate from the land, because in *Potter* v. *Inland Revenue Commissioners* (1) and *Inland Revenue Commissioners* v. *Angus* (2), it is pointed out that something does turn on the way in which the parties treat the matter; and I think the real point in this case is whether, looking at the form in which this agreement for sale was framed, the parties must, or must not, be considered as having treated this goodwill as a property of value separate and apart from the premises. If they did so treat it, I think it would follow, as Lindley L.J. said in *Inland Revenue Commissioners* v. *Angus* (2), that if the parties chose to convey real estate by one deed and goodwill by another, stamp duty would be payable upon both the real property and the goodwill. Indeed, I do not think it necessary that the conveyance should be by separate deeds; if the real property and the goodwill were conveyed in separate witnessing parts of the same deed, it would come to the same thing; if the parties treat the goodwill as a separate property apart from the land, then in all probability it would be treated for stamp purposes as property other than land. It may be argued that here they have so treated it, because the contract says that the vendor shall sell, "firstly, the goodwill of the business" and the benefit of the licences, and secondly the lease. They have, therefore, undoubtedly treated the goodwill as a separate thing from the lease; but have they treated it as a separate thing from the land, and is it not really land after all? If it is in point of fact a value in the land and nothing else, the fact that in the agreement for sale the parties treated it separately from the lease does not, as it seems to me,

(1) 10 Ex. 147. (2) 23 Q. B. D. 579.

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alter its character as land. This goodwill really is part of the value of the land and nothing else, and there is nothing to shew that the parties have treated it in the agreement in such a way that it can be said that for the purposes of stamp duty this is an agreement, so far as the goodwill is concerned, for selling any property except lands or goods; on that ground, I think there is no ad valorem duty attaching to so much of the property as passed, or was agreed to be sold, by this agreement as is comprised within the term "goodwill." The result is that the only part of what was agreed to be sold to which the ad valorem duty would attach would be the book debts, which are not goods within the meaning of the section.

As regards the question whether the declaration of trust should have been stamped as a conveyance, that is not directly before us. In all probability it ought, and that is the point at which the commissioners would have got their ad valorem duty; for although there is a clause in the schedule of the Stamp Act as to declarations of trust being stamped with a 10*s.* stamp only, yet when those declarations of trust are conveyances in pursuance of sale, s. 54 probably applies to them, and therefore that instrument ought to have been stamped with an ad valorem stamp. I cannot see that, because that ought to have been so, we should in any way transfer the ad valorem stamp to the other instrument. As I have already said, I do not think we can consider the agreement itself in the light of what was subsequently done more or less in pursuance of it. Of course, if there had been a subsequent conveyance of the legal interest (and we are told that since the assessment by the commissioners there has been one in the present case), that subsequent conveyance would be treated as a document completing the title, and would be stamped with an ad valorem stamp. For the reasons I have given, it seems to me that we must answer the first question in the negative; as to the second question, ad valorem duty is chargeable only on the book debts.

*Judgment for the appellants.*

Solicitor for appellants: *A. E. Griffiths.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
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*Dec.* 10.

## *In re* IZOD.
## *Ex parte* THE OFFICIAL RECEIVER.

*Bankruptcy—Receiving Order — Rescission — Arrangement with Creditors — Discretion—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 104—*Bankruptcy Act*, 1890 (53 *&* 54 *Vict. c.* 71), *s.* 3, *sub-s.* 6.

In the exercise of the general discretion given to a Court of Bankruptcy by s. 104 of the Bankruptcy Act, 1883, to rescind its orders, the Court may rescind a receiving order where an arrangement is, subsequently to the making of the order, effected by the debtor with his creditors otherwise than in pursuance of the provisions of s. 3 of the Bankruptcy Act, 1890, though the Court will only do so with great caution and under special circumstances which make it quite clear that the arrangement is for the benefit of the creditors, and the debtor has not been guilty of misconduct in connection with his insolvency.

So *held* by A. L. Smith L.J. and Collins L.J., Rigby L.J. dissenting.

APPEAL from the order of a registrar in bankruptcy rescinding a receiving order.

The debtor carried on business as a hosier, and, executions having been put in upon his premises by two judgment creditors, he presented a petition in bankruptcy on July 22, 1897, and a receiving order was made upon the petition on the same day. The debtor had submitted a statement of his affairs, and had undergone a preliminary examination by the official receiver, but had not been publicly examined. The first meeting of creditors was held on August 9, and adjourned until August 30 to enable the debtor to submit a proposal. Prior to the meeting on August 9 a private meeting of creditors had been held and had appointed three of the principal creditors to inquire into and report as to the position of the debtor's affairs, and generally to act in the interests of the creditors. It appeared that this committee had determined that, having regard to the nature of the debtor's stock and the class of persons indebted to the debtor's estate, it would be more to the benefit of the creditors to receive an immediate cash dividend of 10*s.* in the pound than to have the affairs of the debtor wound up in bankruptcy. An arrangement was thereupon

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made to the effect that the debtor's father should pay to all the creditors a composition of 10*s.* in the pound upon the amount of their respective debts, and the creditors respectively should withdraw their proofs and release the debtor from the debts due to them respectively. The debtor's father had accordingly paid to all the creditors 10*s.* in the pound on the amount of their respective debts, and they by deed had released the debtor therefrom. At the adjourned meeting on August 30 the proofs of the creditors were withdrawn, and an order was thereupon made by the registrar, with the consent of the official receiver, for a stay of all proceedings in the bankruptcy until October 26 for the debtor to make such application as he might be advised, the debtor undertaking to keep an account of the business and pay over to the official receiver all moneys received, less current expenses and an amount to be fixed by the official receiver for maintenance of the debtor. An order was subsequently made continuing the stay of proceedings until November 5 upon the same terms.

Upon November 5 the debtor applied to the registrar to rescind the receiving order. The official receiver did not at the hearing of that application make any objection to the conduct of the debtor or ask that he should be publicly examined. The registrar rescinded the receiving order.

*The Attorney-General* (*Sir R. E. Webster, Q.C.*) and *Muir Mackenzie*, for the official receiver. It is contended that the registrar had no jurisdiction to rescind the receiving order merely on the ground that a private arrangement had been made with the creditors; and, secondly, if he had jurisdiction, that he exercised it wrongly. Sect. 104 of the Bankruptcy Act, 1883, which enables the Court to rescind or vary its orders, must be read in a case like this as subject to the provisions of s. 3, sub-s. 6, of the Bankruptcy Act, 1890. That sub-section expressly provides that an application for approval of a composition or scheme of arrangement with creditors shall not be heard until after the conclusion of the public examination of the debtor. The only ground upon which the application to rescind the receiving order was founded was the private arrange-

ment with creditors. It is for the Court, where proceedings in bankruptcy have once been taken, to say whether the estate is to be administered in bankruptcy or a scheme of arrangement is to be allowed. It is against the policy of the Bankruptcy Acts to allow the creditors of their own discretion to accept a composition. The evils of private arrangements between debtors and their creditors were notorious, and it has been the policy of the Bankruptcy Acts to discourage, if not altogether to prevent, such arrangements. In a series of cases decided in relation to s. 18 of the Bankruptcy Act, 1883, which is now repealed, and which was analogous to, but not so stringent as, s. 3 of the Bankruptcy Act, 1890, it was held that the Court would not rescind a receiving order merely on the ground that there had been a private arrangement with creditors which did not comply with the requirements of the Act: see *Ex parte Leslie* (1); *In re Dixon and Cardus* (2); *In re Hester*. (3) It may be that, if the debtor were publicly examined, it would appear that the estate was sufficient to pay more than 10*s*. in the pound, or that there had been misconduct on his part in the carrying on of his business, or offences by him against the bankruptcy law. The contrary ought not to be presumed before the means of investigation provided by the Act have been brought into play. It is contrary to public policy and the spirit of the Bankruptcy Act to allow a debtor who has once become subject to the jurisdiction of the Bankruptcy Court to escape from that jurisdiction by means of a private arrangement with creditors, unaccompanied by any of the safeguards provided in the case of a scheme of arrangement with creditors carried out under the Bankruptcy Act. In the case of *In re Flatau* (4), decided upon the Bankruptcy Act, 1890, the Court, applying the same principles as in the earlier cases decided on the Act of 1883, refused to rescind a receiving order. A receiving order ought only to be rescinded in cases where an adjudication of bankruptcy could be annulled, namely, where the creditors have been paid in full, or where the adjudication ought never to have been made: *Ex parte Leslie*. (1)

(1) (1887) 18 Q. B. D. 619.
(2) (1888) 5 Morrell Bank. Cases, 291.
(3) (1889) 22 Q. B. D. 632.
(4) [1893] 2 Q. B. 219.

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*Herbert Reed, Q.C.*, and *A. H. Carrington*, for the debtor. Sect. 104 of the Bankruptcy Act, 1883, gives the Court a general power to rescind or vary any order made by it. The jurisdiction so given is not restricted or qualified by the provisions of s. 3, sub-s. 6, of the Bankruptcy Act, 1890. In none of the decisions of this Court under the Act of 1883 with regard to cases of this kind has it ever been disputed that the rescission of a receiving order is entirely a matter for the discretion of the Court. In the cases of *Ex parte Leslie* (1), *In re Dixon and Cardus* (2), and *In re Hester* (3) it was held that the refusal to rescind the receiving order was a correct exercise of that discretion in the particular case, but it was not disputed that the discretion existed. The Bankruptcy Act, 1890, has made no difference in this respect. The provisions of s. 3 are for this purpose substantially identical with those of s. 18 of the Act of 1883. Under s. 18 a scheme of arrangement under the Act had to be adopted by two meetings of creditors, and it was provided that the second of those meetings should not be held until after the conclusion of the debtor's public examination. Under s. 3 of the Bankruptcy Act, 1890, a scheme of arrangement under the Act is to be submitted to one meeting of creditors only, and the application for its approval by the Court is not to be heard until after the conclusion of the debtor's public examination. So the effect of the two sections in this respect is practically the same. The cases of *In re Flatau* (4) and *In re Davidson* (5) shew that the jurisdiction to rescind the receiving order is not affected by the Bankruptcy Act, 1890. The scheme of the Bankruptcy Acts is that, if a petition is presented, the Court may make a receiving order for the protection of the estate; but it does not necessarily follow that the estate must subsequently be administered in bankruptcy or under the Act. In many cases that would be an absurd result. In the present case the scheme of arrangement could not now be carried through under the Act, because there are no creditors, the debts having been all released and the proofs

(1) 18 Q. B. D. 619.
(2) 5 Morrell Bank. Cases, 291.
(3) 22 Q. B. D. 632.
(4) [1893] 2 Q. B. 219.
(5) W. N. (1894) 210.

withdrawn. A public examination of the debtor could under the circumstances only be a form, and, as no scheme of arrangement under the Act is now possible, the result of not rescinding the order would be that the business must be stopped and the estate must be administered in bankruptcy; and then, there being no creditors, ultimately the surplus after payment of the costs and the expenses of the realization would have to be handed over to the debtor. The debtor has submitted his statement of affairs and undergone a preliminary examination by the official receiver. No misconduct on his part was suggested by the official receiver, who consented to a stay of proceedings in order that the debtor might make such application as he might be advised, obviously meaning an application to rescind the receiving order, and the official receiver also consented to the debtor's being allowed in the meantime to carry on the business. This shews that the official receiver was satisfied that there had been no misconduct on the debtor's part, and that the arrangement with creditors was an honest one. The interests of the creditors were safeguarded in this case by the committee appointed by them and by the supervision of the proceedings by the official receiver. No doubt private arrangements of this kind require to be narrowly scrutinized and watched by the Court, but it has not been laid down that they never can be a ground for rescinding the receiving order: see per Fry L.J. in *In re Dixon and Cardus* (1) and *In re Hester*. (2) The suggestion made by Cave J. in *Ex parte Leslie* (3), that a receiving order ought only to be rescinded on such grounds as would be sufficient under s. 35 of the Act of 1883 for annulling an adjudication, has not been supported in the later cases.

[They also cited *Ex parte Carr* (4); *Ex parte Wemyss*. (5)]

*Muir Mackenzie*, in reply.

A. L. SMITH L.J. I think the order of the registrar should be affirmed. Two questions have been raised in this case, the first being whether the registrar had jurisdiction to rescind the

(1) 5 Morrell Bank. Cases, 291.
(2) 22 Q. B. D. 632.
(3) 18 Q. B. D. 619.
(4) (1886) 35 W. R. 150.
(5) (1884) 13 Q. B. D. 244.

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receiving order, and the second being whether, assuming that he had jurisdiction, he has exercised it rightly. The circumstances of this case render it, in my opinion, one of an exceptional character. The debtor, being in difficulties, filed a bankruptcy petition on July 22 in the present year, and on the same day a receiving order was made. An arrangement was afterwards made in pursuance of which the debtor's father paid the creditors a composition of 10*s.* in the pound upon the amount of their respective debts. The official receiver, the officer of the Court whose duty it was to stand between the debtor and his creditors and to protect the latter, was all this time superintending the proceedings. I have no doubt that he knew well enough the position of this debtor, and that there was no reason to suspect any delinquency on his part; and also that the sum of 10*s.* in the pound was more than the creditors would obtain by proceeding with the bankruptcy. He consented to the stay of proceedings in the bankruptcy for the purpose of allowing the debtor to make such application as he might be advised. The feature of this case upon which I wish to lay emphasis as differentiating it from ordinary cases is that the public officer whose duty it was to investigate the debtor's conduct, if there were any ground for suspecting misconduct on his part, never asked for any public examination of the debtor or made any suggestion of misconduct on his part, but appears to have been content that the receiving order should be rescinded. But then the Board of Trade steps in, and, notwithstanding the action of the official receiver, insists on public grounds that there should be a public examination of the debtor, although, so far as I can see, such an examination would end in nothing.

The Attorney-General at first contended that the registrar had no jurisdiction to rescind the receiving order, though he did not insist at any length on that contention, because the cases which he cited were really authorities to the contrary. I will deal first with that contention. At the beginning of the argument I was led to suppose that the 6th sub-section of the 3rd section of the Bankruptcy Act, 1890, had the effect of prohibiting the Court from entertaining such an application as

that in the present case until after the conclusion of the public examination of the debtor. It was, however, soon pointed out that s. 104 of the Bankruptcy Act, 1883, gives to every Court having jurisdiction in bankruptcy a general power to review, rescind, or vary any order made by it under the bankruptcy jurisdiction. I agree with the contention of the debtor's counsel that, although the 3rd section of the Bankruptcy Act, 1890, differs somewhat in its terms from s. 18 of the Bankruptcy Act, 1883, so far as the present point is concerned, they are substantially to the same effect. On looking at the cases which have been decided from the year 1884 down to the year 1894, the last two being since the passing of the Act of 1890, I cannot see that in any of them any doubt is expressed as to the existence of jurisdiction to rescind the receiving order. In the face of those authorities I cannot say that the registrar had no jurisdiction to make the order which he did.

Then the question arises whether he exercised his jurisdiction wrongly. It was argued that he did, because the authorities shewed that a receiving order ought not to be rescinded except in cases where an adjudication could be annulled—that is to say, unless the creditors have received 20*s.* in the pound, or the receiving order was wrongly made. I do not think that the authorities lay down any hard and fast rule to that effect. In *Ex parte Leslie* (1) and *In re Hester* (2) Cave J. no doubt said that that was the rule; but the judgment of the Court of Appeal in *In re Hester* (3), and the authorities subsequent to that case, do not bear out his view. Lord Esher M.R. said in that case: "Then we come to *In re Dixon and Cardus* (4), and that seems to me to decide this, that, when a receiving order has been made, and the creditors have not been paid in full, and it is not suggested that the receiving order was wrongly made in the first instance, any proposition for something less than a payment of the creditors in full must be a scheme or arrangement, and, if that arrangement is not in substance an arrangement which would satisfy the requirements of s. 18, the

(1) 18 Q. B. D. 619.
(2) 22 Q. B. D. 632.
(3) 22 Q. B. D. 637.
(4) 5 Morrell Bank. Cases, 291.

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fact that it is possible for the debtor to propose a scheme with all the formalities of s. 18, but that, instead of proceeding under s. 18, he asks the Court to rescind the receiving order on the footing of a different scheme, and so to remove the control of the Court, is a very material matter to be considered. But I think that in that case the Court also said that, if the proposed arrangement is equivalent to a scheme under s. 18, and the Court can see that it may with perfect safety be sanctioned, they would not decide that such a proposition must be at once rejected merely because the formalities imposed by s. 18 have not been complied with." Fry L.J. in the same case said: "In my judgment in *In re Dixon and Cardus* (1) I agreed with the Master of the Rolls that we should not lay down that no arrangement with creditors could have effect given to it, unless it proceeded under s. 18. I will not say that now." All three of the judges who decided that case pointed out the necessity of closely scrutinizing compositions of this kind in order to protect the interests of creditors; but, as I understand their judgments, they decided that the Court had a discretion to rescind the receiving order, and did not decide that it ought only to be exercised where the creditors had been paid in full, or the receiving order ought not to have been made in the first instance. Again, in *In re Flatau* (2) the judgment of Lord Esher M.R., in my opinion, clearly shews that the Court has a discretion to rescind the receiving order, and the considerations with regard to which it ought to be exercised. He said: "Then he [the debtor] went before the registrar with an application to rescind the receiving order which, as it then stood, was a good and valid order. He did not produce any affidavit, but he satisfied the registrar that he had the consent of the petitioning creditor; and I think the appeal must be decided on the assumption that that fact was proved to the registrar, but that fact alone. He had the consent of the petitioning creditor; he had paid him and satisfied him. But there were, or might be, other creditors, and they were not there, and the circumstances were not known to the registrar. Could the registrar properly on that, and on that alone, rescind the receiving order, without

(1) 5 Morrell Bank. Cases, 291. (2) [1893] 2 Q. B. 219.

entering upon a consideration of all the circumstances of the debtor's insolvency—how it came about; what had been the conduct of the debtor when he incurred the debts; what had been his conduct after the debts were incurred, and what was the position of things at the time? All these were things which ought to be considered, if we are of opinion that the order could not be rescinded merely upon the consent of the petitioning creditor." These observations of the Master of the Rolls shew that the discretion of the Court is not limited, as the counsel for the official receiver contended; that other matters than those suggested by them can be taken into consideration by the registrar in determining whether the receiving order shall be rescinded; and that, if those matters are considered, and it appears that there is no misconduct on the part of the debtor either in the way in which he has carried on his business, or otherwise in relation to his insolvency, then there is a discretion to rescind the receiving order.

In the present case it appears to me that the matters indicated by Lord Esher M.R. were all considered by the registrar. He had all the circumstances of the case before him, and the official receiver was not able to inform him of any ground upon which any further investigation of the case was requisite, and he therefore considered that no further investigation was requisite. The last case on the subject is *In re Davidson* (1), which, I think, clearly shews that the registrar has a discretion in such a case as this. In that case the same registrar who decided the present case refused to rescind the receiving order, as would probably be the result in the great majority of cases, on the ground that the case required further investigation. The Court there said that it was for the registrar in exercising his discretion to take into consideration all the circumstances of the case, and that it would need a very strong case to induce the Court to interfere with his decision. The same principle appears to me to be applicable here, though in that case the registrar refused the application, while in this case he allowed it. I agree with the registrar that the case is an exceptional one, and, having regard to the particular

(1) W. N. (1894) 210.

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circumstances of it, I cannot say that the decision of the registrar was wrong. The appeal must therefore be dismissed.

RIGBY L.J. I regret to say that I dissent from the view entertained by the other members of the Court on several grounds. I do not question that the Act gives the registrar (i.e. the Court) a discretion under certain conditions to rescind a receiving order. But I think the Act shews that this discretion is subject to limitations in certain cases, of which I should say the present case was one. It is well known that one of the grave evils which it has been the object of the bankruptcy legislation of recent years to remedy arose from settlements with creditors by private arrangement. The Act of 1890 seems to me to have guarded against this evil by s. 3 very effectually, but, if such a general discretion to set aside receiving orders as is suggested on behalf of the debtor exists, it may detract considerably from the beneficial effect of the Act. I do not take quite the same view of the decisions as has been taken by my brother A. L. Smith L.J. No doubt s. 3 of the Bankruptcy Act, 1890, proceeds generally on very much the same lines as s. 18 of the Bankruptcy Act, 1883, but the earlier Act did not in terms say that an application for approval of a scheme of arrangement should not be heard until after the conclusion of the public examination of the debtor. There has been a series of cases, one of them being *In re Hester* (1), with regard to the Act of 1883, in which, as I read the decisions, the leading consideration upon which the Court relied in refusing to rescind the receiving order was that the debtor was propounding a scheme of arrangement otherwise than in accordance with s. 18. The judges who decided those cases did not expressly decide that the Court had no discretion in such a case as this to rescind the receiving order, and sentences may no doubt be picked out here and there in their judgments tending to shew that there might be such a discretion; but, as the Court in those cases were affirming the refusal of the registrar to rescind the receiving order, it was unnecessary for them to decide a point that did not arise; and it appears to me that they expressly

(1) 22 Q. B. D. 632.

declined to decide whether or not in cases of arrangement with creditors, when a receiving order had been made, the debtor was bound to proceed in accordance with s. 18. Then came the Act of 1890. I think some effect ought to be given to the change of phraseology in s. 3 of that Act, by which any application for approval of a scheme is expressly prohibited until after the completion of the public examination of the debtor. That alteration of phraseology may have been intended to put an end to the doubts which arose under the Act of 1883 as to whether there was a general discretion to rescind a receiving order in the case of an arrangement with creditors. I know that the language of sub-s. 6 of s. 3 does not in terms apply to applications for rescission of a receiving order, but only to applications for approval of a scheme of arrangement, but it appears to me that it would be a strange thing to hold that a debtor can set up as a ground for rescission of the receiving order a scheme in respect of which he could not apply to the Court for approval because his public examination had not taken place. It is not necessary to say that the Court has absolutely no jurisdiction to entertain an application to rescind a receiving order in such a case as this, but I am clearly of opinion that it was never intended that the main or only ground for such an application might be such a private arrangement with creditors as it was the object of the Act to render illegal and prevent in the case of bankruptcy proceedings.

It has been said that this is a special case. I cannot see that there is anything special in it, and I fear that cases of this kind will have a tendency to become very general if the order of the registrar is upheld. The debtor, by filing his petition, voluntarily subjected himself to the bankruptcy law. It may or may not be the case that he had, when he did so, an intention to have the estate administered in bankruptcy, but advantage has de facto been taken of the filing of the petition to obtain a respite from the claims of creditors, and to negotiate a private arrangement with the debtor's creditors. That is so far from being in accordance with the spirit and intention of the Act that I cannot think that, in rescinding the receiving

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order merely on the ground of such a private arrangement having been made, the registrar correctly exercised his discretion, assuming that he had a discretion, which I do not decide. The only basis that appears to me to have existed in this case for the application to rescind the receiving order was the private arrangement made with the creditors; and I think it would be departing from the obvious intention of the Act to make that a sufficient ground for the application.

I think that there is a good deal to be said for the view expressed in some of the cases that, in dealing with an application to rescind a receiving order, the Court ought to look to the grounds upon which an adjudication of bankruptcy can be annulled under s. 35 of the Bankruptcy Act, 1883; for I can see no distinction in substance between rescinding a receiving order and annulling an adjudication. I think, therefore, that we ought, in dealing with this case, to look to the grounds for annulling an adjudication given by s. 35 of the Bankruptcy Act, 1883. That section provides for annulling the adjudication only in two cases—namely, where the Court is of opinion that the debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the creditors have been paid in full. There are no such grounds in the present case. The creditors have not been paid in full, and it is clear that the receiving order was rightly made. I do not see why the analogy of an application to annul an adjudication of bankruptcy should not be applicable in this case. As was said in *Ex parte Leslie* (1), in a case of this kind the debtor has brought himself within the jurisdiction of the Court of Bankruptcy. There are two ways in which a person who has come within that jurisdiction may get rid of the bankruptcy proceedings. One is by the annulling of the adjudication under s. 35, or, if there has only been a receiving order, by the rescission of the order by analogy to that section; the other is, not by means of a scheme of private arrangement with creditors, but by means of a legal scheme of arrangement under the Act with all the safeguards provided by s. 3 of the Act of 1890. Then, why should the debtor be allowed otherwise to escape from the

(1) 18 Q. B. D. 619.

operation of the bankruptcy law? I see no reason why he should. I think that at any rate it should be a most exceptional case to induce the Court to rescind a receiving order where no grounds would exist for annulling an adjudication under s. 35; and I certainly do not think the rescission of a receiving order ought to be founded on a mere scheme of private arrangement with creditors unaccompanied by any of the safeguards provided in the case of a scheme of arrangement under the Act. Even if the official receiver did consent to such a rescission, his consent does not estop the Court, or relieve it from the duty of exercising its own discretion in deciding the case. What did take place in the present case? The official receiver consented to a postponement of the proceedings in bankruptcy on certain terms—namely, that the debtor should pay over all the receipts of the business after deducting current expenses and such an amount as might be allowed for his maintenance. It was urged that this shewed the reliance placed by the official receiver upon the debtor, but I cannot admit that it shews that the official receiver approved of his conduct or assented to the rescission of the receiving order. It would have been wrong for him to do so until he had exhausted all the means given by the Act for investigating the conduct of the debtor. All that can be said, I think, is that the rescission of the receiving order was not opposed by the official receiver. The order made by the registrar cannot be said, in my opinion, to have been made with the consent of the official receiver. It has been suggested that it is not really the official receiver but the Board of Trade that is objecting to the order of the registrar. The official receiver is no doubt an officer of the Court, but he is bound to some extent to act under the directions of the Board of Trade. Probably, when the case came to be considered, it appeared to the Board of Trade to be so important in point of general principle that they thought it desirable that the official receiver should do what he might have done on his own initiative—namely, appeal against the order. I can see nothing special in this case to differentiate it from any ordinary case in which an insolvent person initiates bankruptcy proceedings and takes advantage of them to effect a private arrangement with his

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creditors, and then, because he has done that which the Bankruptcy Act intends to discourage, if not to prohibit, comes to ask for a rescission of the receiving order. In my opinion the appeal should be allowed.

COLLINS L.J. I agree with the judgment delivered by my Lord, but, as my brother Rigby differs, I will add a few words.

The first question is whether the registrar had jurisdiction to rescind the receiving order. The argument for the official receiver was that, by virtue of the provisions of sub-s. 6 of s. 3 of the Bankruptcy Act, 1890, there could be no such jurisdiction in this case until after the completion of the public examination of the debtor. But, when that sub-section is examined, it is clear that it relates only to an application for approval of a scheme of arrangement by the Court. The jurisdiction to rescind the receiving order depends upon an independent section, namely, s. 104 of the Bankruptcy Act, 1883, which by its terms purports to give to the Court an absolute discretion to rescind or vary its orders. Therefore, the question really is whether it is a condition precedent to the exercise of the jurisdiction given by that section in a case like the present that there should have been an approval by the Court of the scheme of arrangement pursuant to s. 3 of the Act of 1890. I think that that question is concluded by authority. There are two cases at least in which the Court of Appeal appear to me to have expressed an opinion, though perhaps they did not absolutely decide the point, that such an approval of the scheme was not a condition precedent to the existence of jurisdiction to rescind the receiving order. One of those cases was *In re Hester*. (1) That case was decided under the Act of 1883. It has been suggested that there is a difference for the present purpose between the language of that Act and that of the Act of 1890. But, when the provisions of the two Acts on this subject are considered, it will be seen that they are substantially the same in the result, and that under both of them the completion of the public examination of the debtor is a condition precedent to the approval of the scheme

(1) 22 Q. B. D. 632.

by the Court. Under the earlier Act the scheme had to be adopted by two meetings of the creditors, and the second meeting could not take place until after the public examination of the debtor. Under the later Act the scheme has only to be adopted by one meeting of creditors, and it is made a condition precedent to the approval of the scheme by the Court that the public examination of the debtor should have been completed. Therefore, the cases that were decided under the earlier Act are still applicable. But the matter does not rest there, for there are two cases which were decided since the Act of 1890. The first of these is *In re Flatau* (1), in which it appears to have been held that the Court has full discretion to rescind a receiving order, though they will not rescind the order without a careful investigation of all the circumstances of the case, including the conduct of the debtor. That case was followed by *In re Davidson* (2), in which the Court held that the registrar had a discretion with regard to the rescission of a receiving order which he must exercise upon consideration of all the circumstances of the case. Therefore, it seems to me clear that the registrar had in this case a discretion to deal with the application for rescission of the receiving order.

Then it is said that he exercised his discretion wrongly. The Court, in affirming the decision of the registrar in *In re Davidson* (2), said that the exercise by the registrar of his discretion in such a case ought not to be interfered with except on the strongest possible grounds. The same learned registrar, who in that case refused to rescind the receiving order, has held that the circumstances of this case justified him in rescinding it. It has been said, and I quite agree, that the greatest possible vigilance ought to be used in such cases for the protection of the interests of the creditors and the public. Has such vigilance been used in the present case? There has been a preliminary examination of the debtor by the official receiver. The proceedings have been carried on under his eye ever since July, and he has apparently been an assenting party to all that has been done. The interests of the public and the creditors have therefore been safeguarded by him, and also by

(1) [1893] 2 Q. B. 219. (2) W. N. (1894) 210.

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the long experience in such cases of the registrar, who felt himself in this case justified in rescinding the receiving order. For these reasons I think the appeal should be dismissed.

*Appeal dismissed.*

Solicitor for official receiver: *Solicitor to Board of Trade.*
Solicitor for debtor: *Percy C. Ray.*

E. L.

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[IN THE COURT OF APPEAL.]

## LOLE *v.* BETTERIDGE.

*Bankruptcy—Execution—Sheriff—Notice of Bankruptcy Petition — Service—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-s.* 2—*Bankruptcy Rules*, 1886, *r.* 90.

Rule 90 of the Bankruptcy Rules, 1886, which provides that service of notices, orders, or other proceedings shall be effected before the hour of six in the afternoon, except on Saturdays, when it shall be effected before the hour of two in the afternoon, does not apply to the notice to the sheriff of a bankruptcy petition mentioned by s. 11, sub-s. 2, of the Bankruptcy Act, 1890.

Therefore, where a sheriff to whom money had been paid by an execution debtor in order to avoid a sale under an execution upon a judgment for more than 20*l.* was, after two in the afternoon of the fourteenth day after the payment, being a Saturday, served with notice of a bankruptcy petition upon which a receiving order was made against the debtor:—

*Held*, that the sheriff must pay the balance of the money so paid, after deducting his costs, to the official receiver.

APPEAL from an order made by a judge at chambers upon an interpleader summons as after mentioned.

The plaintiff, having recovered judgment in an action, issued execution against the goods of the defendant. Upon September 6, 1897, the sheriff seized goods of the defendant under the execution for 62*l.* 4*s.*, the amount due on the judgment.

Upon September 18 the defendant paid out the sheriff in order to avoid a sale of the goods. On October 2, which was a Saturday, a receiving order was made against the defendant upon

a bankruptcy petition presented by him. On the same day the official receiver sent a telegram to the under-sheriff informing him that a receiving order had been made on the petition and claiming the proceeds of any execution against the defendant. This telegram reached the under-sheriff at 3.40 in the afternoon of October 2. The execution creditor claiming the money paid by the debtor, the sheriff interpleaded, and the judge at chambers, being of opinion that by virtue of rule 90 of the Bankruptcy Rules, 1886, the service of the notice on the sheriff after two o'clock in the afternoon on Saturday was too late, ordered the sheriff to pay over the balance of the money in his hands, after deducting his costs of execution, to the execution creditor. (1)

*Herbert Reed, Q.C.*, and *Turrell*, for the official receiver. Rule 90 does not apply to the notice contemplated by s. 11, sub-s. 2, of the Bankruptcy Act, 1890. It only applies to notices which form part of the legal procedure in a bankruptcy.

The group of rules of which it is one is headed "Service and Execution of Process," and the rules with which it is associated are all rules of procedure. Grove J. took that view of the rules in *Curtis* v. *Wainbrook Iron Co.* (2) The section clearly gives

(1) Bankruptcy Act, 1890, s. 11, sub-s. 2: "Where under an execution in respect of a judgment for a sum exceeding 20*l.*, the goods of a debtor are sold, or money is paid in order to avoid a sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and, if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver, or, as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor."

Rule 90 of Bankruptcy Rules, 1886: "Service of notices, orders, or other proceedings shall be effected before the hour of six in the afternoon, except on Saturdays, when it shall be effected before the hour of two in the afternoon. Service effected after six in the afternoon on any week-day, except Saturday, shall for the purpose of computing any period of time subsequent to such service be deemed to have been effected on the following day. Service effected after two in the afternoon on Saturday shall for the like purpose be deemed to have been effected on the following Monday."

(2) (1884) Cab. & E. 351.

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the period of fourteen full days, and it cannot be cut down by the rule.

[They also cited *In re Cripps, Ross & Co.* (1)]

*Muir Mackenzie*, for the execution creditor. There is a marked distinction in the language of the Bankruptcy Acts between cases where it is contemplated that a notice shall be served, as, for instance, in s. 4, sub-s. 1 (*g*), of the Act of 1883, and cases where notice by any means will be sufficient, and the word "notice" is used merely as equivalent to knowledge, as in s. 37, sub-s. 2, of the Act of 1883. Sect. 11 of the Bankruptcy Act, 1890, speaks of "service" of notice of a bankruptcy petition on the sheriff. It is submitted that rule 90 applies to all cases where service of notice is requisite. If so, the effect is that there was no service of notice of the bankruptcy petition upon the sheriff upon October 2, and, the fourteen days having expired without such a notice having been served, the execution creditor was entitled to the money in the hands of the sheriff. [He cited *Bellyse* v. *M'Ginn*. (2)]

[COLLINS L.J. The only effect of rule 90 seems to be that, if the service of the notice be after the prescribed hour, for the purpose of computing any subsequent period of time, it shall be deemed to have been effected on the following day.]

*Turrell*, in reply. Sect. 11 specifically provides that the sheriff shall hold the proceeds of the execution for fourteen days; but, if the contention for the execution creditor is correct, he might have handed them over to the execution creditor immediately after two o'clock on October 2.

*R. Coventry* appeared for the sheriff.

A. L. SMITH L.J. The question in this case is whether the period of fourteen days, during which the proceeds of an execution are by s. 11, sub-s. 2, of the Bankruptcy Act, 1890, to be retained by the sheriff, is cut down by the operation of rule 90 of the Bankruptcy Rules, 1886.

The facts in this case are not in dispute. Upon September 6 the sheriff seized the goods of the debtor in execution, and on September 18 the debtor paid the amount due on the judgment

(1) (1888) 21 Q. B. D. 472. (2) [1891] 2 Q. B. 227.

to avoid a sale. The sheriff was bound under s. 11 to hold the money so paid for fourteen days, and was holding it on October 2.

It is not disputed that s. 141 of the Bankruptcy Act, 1883, applies to this case, and therefore the computation of the fourteen days under s. 11 starts with September 19, and, unless the period mentioned by s. 11 is cut down by the operation of the rule, it would cover the whole of Saturday, October 2. The execution creditor, however, contends that, by the operation of rule 90, the period of fourteen days expired at two o'clock in the afternoon of October 2, and therefore he is entitled to have the money paid under the execution handed over to him, because the sheriff did not receive notice of the bankruptcy petition until 3.40 in the same afternoon. I take it that the Bankruptcy Rules have the same force as an Act of Parliament; but the first question is whether rule 90, the rule in question, applies to the notice of a bankruptcy petition contemplated by s. 11, sub-s. 2, or only to notices which form part of the procedure in bankruptcy proceedings. I am of opinion that it applies only to the latter. The rule in question is one of a group of rules headed "Service and Execution of Process." Rule 89, which is the first of the group, applies to procedure, and to nothing else. Rule 90 provides that service of notices, orders, or other proceedings shall be effected before the hour of six in the afternoon, except on Saturdays, when it shall be effected before the hour of two in the afternoon. It seems to me clear that the notices contemplated by this rule are notices which form part of the legal procedure in a bankruptcy matter. This conclusion is fortified by the subsequent rules of the same group, namely, rules 91 to 93. I agree with the view taken by Grove J. in the case of *Curtis* v. *Wainbrook Iron Co.* (1) I have no doubt, therefore, that the sheriff was bound, under s. 11, sub-s. 2, to retain the money paid by the debtor for the full period of fourteen days, and, having before the end of that period received notice of the petition upon which a receiving order was made against the debtor, he was bound to hand over the money to the official receiver.

(1) Cab. & E. 351.

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But there is another ground on which this case may be decided. I think that the point suggested by my brother Collins during the argument is a good one. There is nothing in rule 90 to the effect that the service of a notice is bad if it is not served in accordance with the rule. All that the rule provides is that service effected after six in the afternoon on any week-day, except Saturday, shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day, and that service effected after two in the afternoon on Saturday shall for the like purpose be deemed to have been effected on the following Monday. For these reasons, I think the appeal must be allowed and the order of the learned judge must be reversed.

RIGBY L.J. I am of the same opinion. The reasonable view of rule 90 of the Bankruptcy Rules, 1886, appears to me to be that, like the other rules included in the same group, it is concerned with notices and other matters which form part of the legal procedure in a bankruptcy. The preceding rule, for instance, provides that every solicitor issuing out or serving any petition, notice, summons, order, or other document, shall indorse thereon his name or firm and place of business, which shall be called his address for service. The provisions of rule 90 seem reasonably applicable to the case of a notice served in bankruptcy proceedings, but quite inapplicable to the case of a notice by which the sheriff is to be affected with knowledge of the presentation of a bankruptcy petition. The counsel for the execution creditor drew our attention to the fact that s. 11 speaks of notice being "served" on the sheriff of a bankruptcy petition; but, notwithstanding the use of that expression, I am clearly of opinion that the sheriff is bound under the section to hold the proceeds of the execution for the full period of fourteen days, and cannot justify handing them over to the execution creditor until that period has expired without his receiving notice of a bankruptcy petition. It does not appear to me reasonable that the period mentioned by s. 11 should be limited by a rule of procedure such as may reasonably apply to service of notices in bankruptcy proceedings. On the other

hand, it seems very reasonable that, where the service of a notice in the course of legal proceedings forms the point of time from which any subsequent period is to be computed, a strict rule should be laid down as to the hours within which the service must take place; and that appears to be the only object of rule 90. I do not think rule 90 is applicable to the present case, but, if it were primâ facie applicable, it does not in any way invalidate the service of the notice. It merely provides that, for the purpose of computing any period of time subsequent thereto, the service of the notice shall be post-dated.

COLLINS L.J. concurred.

*Appeal allowed.*

Solicitors for official receiver: *Ashwell, Browning & Tutin.*
Solicitors for execution creditor: *Warren, Murton & Miller.*
Solicitors for sheriff: *Rowcliffes, Rawle & Co.*

E. L.

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[IN THE COURT OF APPEAL.]



## IN THE MATTER OF AN ARBITRATION BETWEEN RICHARDSONS AND M. SAMUEL & CO.

*Ship—Charterparty — Exceptions — Lock-out — Accident to Railway — Other Causes beyond Charterer's Control—Causes ejusdem generis with Antecedent Exceptions.*

A ship was chartered to proceed to Batoum, and there load with oil from a named factory, and at a specified rate per day. The charterparty excepted, among other things, "strikes lock-outs accidents to railway," and also "other causes beyond charterer's control." Oil is brought to Batoum by a railway, which was injured by floods so that no oil could be sent down, and the workmen of the factory were discharged, there being no employment for them. Subsequently to the arrival of the ship in port the railway was repaired, and oil arrived in sufficient quantity to load her; but there was delay in doing so, because the workmen who had been discharged could not be got together in sufficient numbers, and such men as were there were employed in loading other vessels according to the order of their arrival, as was the practice of shippers at that port. On a claim for damages for detention of the ship:—

*Held*, that the general clause excepting "other causes beyond charterer's

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control" referred to matters ejusdem generis with the antecedent exceptions, and that the delay in loading the ship after the arrival of the oil could not be attributed to accident to the railway, or to anything ejusdem generis with a lock-out, which was confined to the dismissal of workmen arising out of a trade dispute.

APPEAL from a judgment of a Divisional Court on an award stated in the form of a special case in which Messrs. Richardsons were called the plaintiffs and Messrs. M. Samuel & Co. the defendants.

By a charterparty made between the plaintiffs as owners of the steamship *Nanshan*, and the defendants as charterers, it was agreed that the ship should with all possible despatch proceed to Batoum, and there load a cargo of petroleum in cases from a society hereinafter referred to as Bnito. The defendants had contracted with Bnito for the purchase of the cargo to be loaded in the *Nanshan*. The charter contained, amongst others, the following clauses :—

"The act of God the Queen's enemies insurrections war riots floods strikes lock-outs accidents to railway factories or machinery loss or damage from fire on board in hulk or craft or on shore arrests and/or restraint of princes rulers and people or other causes beyond charterer's control . . . . always excepted.

"The cargo to be loaded as tendered by shippers and as fast as they may deliver but the average rate to be not less than 10,000 cases per weather working day Sundays and holidays excepted (if the vessel be not sooner despatched) . . . . Lay-days for loading and discharge to commence twenty-four hours (Sundays and holidays excepted) after receipt by the charterer's agents of written notice of steamer's readiness in berth to receive and discharge respectively. Charterers to have the right of keeping the steamer ten days on demurrage over and above the said laying days at sixpence per net register ton per day. Captain is bound to receive cargo on any demurrage day."

The *Nanshan* arrived at Batoum and was ready in her berth to receive her cargo on April 2, 1896, and notice of her readiness was duly given to Bnito on that day.

All oil shipped at Batoum comes by railway from Baku in tank wagons. The railway is under the control of the Govern-

ment, and the wagons available are allotted to the respective shippers in proportion to their requirements. The oil is brought in the wagons to factories at Batoum, and is there discharged into reservoirs belonging to the factories respectively. When the oil is to be shipped from a factory in cases it is drawn off by workmen of the factory into tins, which, when filled, are packed at the factory in wooden cases of a regular size. These cases are put into lighters, and the ships are loaded from the lighters.

Owing to floods, which on more than one occasion partially destroyed the railway by which the oil is brought, the transport of oil to Batoum was much impeded during the early months of 1896. The supplies which came down in March were in consequence insufficient to meet the shipping requirements at Batoum during that month, and on April 3 there was no substantial quantity of oil at the Bnito factory or anywhere else in Batoum. Owing to like causes, no oil arrived at that factory or elsewhere at Batoum between April 3 and April 13. Down to April 14 there was no means by which the Bnito factory could have obtained a supply of oil with which to load the *Nanshan* or any other vessel.

At the end of March or beginning of April, as there was no immediate prospect of getting any oil, the workmen employed at the Bnito factory in filling the tins and packing them in the cases were dismissed by Bnito.

On April 14 oil began to arrive again at Batoum, and by April 16 sufficient oil had arrived at the Bnito factory to enable the work of filling cases to be resumed there on April 17. From that time supplies of oil were received in sufficient quantity to enable the factory to turn out filled cases up to the full capacity of the factory for that work.

The work of filling cases was resumed at the factory on April 20; but as the men had to be collected and got to work again, the production of filled cases was at first much below the quantity which the factory could turn out when in regular working. The factory did not work overtime or employ extra men or extra machines; but there was no evidence that it was practicable to do any of those things.

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On April 2, when the *Nanshan* arrived, there were two steamships waiting at Batoum under charter to persons other than the defendants to load oil in cases from the Bnito factory, and when the factory resumed work on April 20 they were loaded before the *Nanshan* because they had arrived before her. This was in accordance with the practice of shippers at Batoum, and, but for the accidents to the railway, the Bnito factory could have loaded those ships before the *Nanshan* and still have loaded the *Nanshan* within her lay-days. There was not, however, any evidence of any binding custom at Batoum that steamers should be loaded in turn.

The case then stated the time occupied in loading the ship, and the different amounts of damages that would be due according as the defendants were excused or otherwise by the exceptions in the charterparty or any of them.

The Divisional Court (Grantham and Wright JJ.) held that the plaintiffs were entitled to recover on the footing that the loading should have been commenced on April 17, and gave judgment accordingly.

The defendants appealed.

*Joseph Walton, Q.C.*, and *J. A. Hamilton*, for the defendants. The ship was sent to load oil at a port at which the oil was only available after a long land transit liable to interruption. The exception clause is a special one intended to meet this state of things, and the charterer does not merely exempt himself from liability after the goods are at the port of delivery, but also from antecedent matters, such as floods, strikes, lock-outs, and accidents to railway, and generally other causes beyond his control. It is now admitted that all delay down to April 17 is excused by the breakdown of the railway; but the effect of the breakdown extended beyond that date. It was the natural consequence of the breakdown that, as no oil was arriving, the men should be dismissed from the factory instead of being kept there idle, and when the oil arrived they could not be got together at once. Again, such a case comes within the exception as to lock-outs, for there can be no reason to limit that expression to a case arising from a dispute between

master and men. It should be noted that neither the employment of the workmen nor the order of loading ships were under the control of the charterers. Supposing that the dismissal of the men was not a lock-out, it was a cause beyond the charterers' control analogous to a lock-out, and comes within the general words of exemption.

*Pickford, Q.C.*, and *Scrutton*, for the plaintiffs. After April 17 the delay that occurred was not the direct consequence of the accident to the railway. The two causes of the delay were the want of men and the loading of other ships first. The former was due to the dismissal of the men, which may have been prudent and reasonable, but was not a direct consequence of the accident to the railway. The latter was due to the fact that the few men available were employed on other ships, but that does not exonerate the charterer from his obligation to load at a certain rate any more than a glut of ships would have excused him had there been no breakdown on the railway. The conjunction of the words "strikes" and "lock-outs" shews that the latter refer to trade disputes forced on the employer, and the general words, which cover only matters ejusdem generis with those that precede, do not exonerate the charterer.

[They cited *Fenwick* v. *Schmalz* (1) and *Stephens* v. *Harris*. (2)]

*Joseph Walton, Q.C.*, in reply.

A. L. SMITH L.J. The question we have to decide on this special case is with regard to what damages or demurrage—it does not matter which—the shipowners are entitled to recover from the defendants on this charterparty. The learned judges in the Divisional Court have held that the plaintiffs are entitled to recover damages on the footing that the ship should have commenced to load on April 17; and the defendants say that this is wrong, because they were excused from commencing to load for several days after that date.

The contract by which the charterers undertook to load through their agent at Batoum a cargo of petroleum at the rate of 10,000 cases per working day is an absolute bargain to

(1) (1868) L. R. 3 C. P. 313. (2) (1887) 57 L. J. (Q.B.) 203.

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load the ship after twenty-four hours' notice has been given, and not a bargain to load the ship in her turn. The dispute arises on the exceptions to this absolute bargain contained in the charterparty. Before I come to the exceptions I will touch briefly on the facts stated in the case. I leave out all that happened prior to April 17, because the charterers are exempted from responsibility for all delay before that day, since the delay arose from an accident to the railway which prevented oil arriving in sufficient quantity to allow of the work of filling cases to be resumed before then. After that date the delay arose from the fact that the charterers' agent had not enough men to load the ship at the stipulated rate. Bnito had discharged the men because, when the accident to the railway happened in March, no oil was arriving and there was no employment for them. The agent took that course in his own interest; and yet it is said that, because when the oil did arrive the men were not there to load the vessel, the charterers were discharged from liability for the delay. Under which of the exceptions does this fact, that Bnito had not enough men to load the ship, fall? The first exception is "accident to railway"; but that without doubt means that where by accident to the railway the charterers' agent cannot get oil to the port for the purpose of loading, the charterers are to be free from liability. The oil was there in sufficient quantity on the 17th. How can it be said that it comes within the exception "accident to railway"—that although the oil was there, the charterers' agent had not enough men for the purpose of loading it on board the ship? In my opinion that point is untenable.

Then it is said that the delay was from causes beyond the charterers' control. It has been pointed out that there is no evidence before us of a contract with Bnito to load according to the terms of the charterparty; but I do not rest my judgment on that. In my opinion the clause cannot be intended to cover all acts of the agent which he has carried out for his own purposes. Of course there must be some limitation put upon these words, otherwise the words that precede would be mere surplusage. In my opinion this clause must be read as covering

exceptions ejusdem generis with those that precede it—that is, matters that deal with the impossibility of getting the oil to the port and into the ship.

The contention that because the delay arose from the loading of the ships in the port in the order of their arrival the charterer is exempt cannot prevail, for it is impossible to treat delay arising from such a cause as due to accident to the railway or as coming within the term "other causes beyond charterer's control."

There is, further, the suggestion that the exception as to strikes and lock-out applies; but those words must have their ordinary meaning given to them—that is, they must be taken to apply to labour disputes; and they do not apply to what was done here, which was that the men were not kept on because it was not to the interest of Bnito to keep them on.

I think, therefore, that the charterers cannot claim any exemption after the 17th, and that the appeal should be dismissed.

RIGBY L.J. Agreeing as I do both as to the conclusion at which my learned brother has arrived and with the reasoning, I shall add very little. With regard to the exception of delays arising from accident to the railway, it is not shewn that after the 17th there was any difficulty in getting oil to the port. The default in loading after that date was not due to an accident to the railway. I was more impressed by the argument founded on the general words that what happened was analogous to a lock-out. I do not say that in other cases a dismissal of workmen might not be analogous to a lock-out; but, having regard to the particular circumstances of this case, where the charterers' agent in his own interest dismissed his men, the matter stands on a different footing, and is not analogous to a lock-out. The expressions "strike" and "lock-out" seem to me to be something imposed on the agent, and not something which he has elected to do, and elected to do not unreasonably. I have nothing further to add except that, as a general rule, if a person desires to take advantage of exceptions, he must give proof that he has done all in his

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power to carry out his contract; and that proof the defendants have failed to give.

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COLLINS L.J. I agree in the reasoning and conclusions already given. I only wish to add, on the question of strikes and lock-outs, apart from the general words, it would appear that a strike is something beyond the control of the person against whom the strike takes place, and that a lock-out is also something that is forced upon him. Apart from any inference as to the meaning of "lock-out" to be gathered from the fact that it is classed with other causes beyond charterer's control, I have no hesitation in holding that what took place in this case was neither a lock-out nor ejusdem generis with one.

*Appeal dismissed.*

Solicitors for plaintiffs: *Thomas Cooper & Co.*
Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

A. M.

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[IN THE COURT OF APPEAL.]

## FIELDING & CO. *v.* CORRY AND OTHERS.

*Bill of Exchange—Notice of Dishonour—Bank with several Branches—Notice to wrong Branch—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 49, *sub-ss.* 12 (*b*), 13.

A branch of a country banking company received from a customer a bill of exchange and forwarded it to a London bank for presentation. The bill was dishonoured, and the London bank on the following day sent notice of dishonour by post to a branch of the country banking company, but not to the branch from which they had received the bill. On the next day they discovered the mistake, and telegraphed notice of dishonour to the branch from which they had received the bill. The notice given by that branch, and all subsequent notices, including that to the defendant, who was an indorser of the bill, were sent in due time. In an action by the holder of the bill:—

*Held*, by A. L. Smith and Rigby L.JJ., Collins L.J. dissenting, that sufficient notice of dishonour had been sent by the London bank to comply with the provisions of s. 49, sub-ss. 12, 13, of the Bills of Exchange Act, 1882.

*Held*, by Collins L.J., that for the purpose of notice of dishonour the

branches of a bank must be regarded as distinct, that the written notice by the London bank, not having been sent to their principals, was ineffective, and could not be made effective by the telegram, which was out of time.

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APPEAL from the judgment of Ridley J. at the trial of the cause with a jury.

The action was by the plaintiffs as holders of a bill of exchange against several defendants, and, among others, against Mrs. Edwards, who was an indorser of the bill. The bill was put into the hands of the Cardiff branch of the County of Gloucester Bank for collection, and forwarded by that branch to the London and Westminster Bank in London, who presented it on Saturday, November 10, 1894. The bill was dishonoured; and on Monday, November 12, the London and Westminster Bank sent by post a notice of dishonour directed to the Cirencester branch of the County of Gloucester Bank. On the following day they discovered the mistake, and telegraphed notice of dishonour to the Cardiff branch. There was no evidence as to the written notice of dishonour having reached the Cardiff bank, but on the Wednesday, which was the day on which notice of dishonour should, in due course, have been given by that branch, this was done. The subsequent notices were given in time. Ultimately the defendant, Mrs. Edwards, received notice at the time at which she would have received it had all the notices been given in order and in due time. The defence to the action was that notice was not sent to the Cardiff branch in time, and that the defendant was therefore discharged. Judgment was entered for the plaintiffs.

The defendant Mrs. Edwards appealed.

*Woodfin*, for the defendant. It is immaterial that notice of dishonour reached the defendant at the same time as if all the prior notices had been correctly given. If once laches on the part of a holder of the bill is established prior indorsers are discharged: *Smith* v. *Mullett* (1); *Turner* v. *Leech*. (2) There was a break in the chain of notices, for branches of a banking company are agencies of the principal company, and notice to a

(1) (1809) 2 Camp. 208. (2) (1821) 4 B. & A. 451.

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branch is not notice to the bank, but to an agent of the bank: *Clode* v. *Bayley*. (1)

*Ashton Cross* and *Edmondson*, for the plaintiffs. Even if notice to a branch is not notice to the parent bank, the effect of breach of continuity of notice only applies to parties, and does not apply in the case of an agent. But it is contended that all the statute requires is that notice should be sent within the specified time. It was sent to the County of Gloucester Bank at one of its addresses, and for this purpose the bank and its branches are identical. The mere fact of the misdirection of a notice cannot necessarily make it invalid, because it may in fact reach the proper address through the post or otherwise. The error in this case was set right by the telegram of Tuesday, which, taken with the letter, made a complete notice. If the Cirencester branch had known the address of the person to whom notice was to go, and had sent notice, it would have been effectual. What was done enabled the Cardiff branch to send on notice in time, and there has been a substantial compliance with the Act,

*Woodfin*, in reply.

A. L. SMITH L.J. The question of law raised in this case is whether notice of dishonour of a bill of exchange was given in time. It appears that the plaintiffs had a bill of exchange, which they handed to the Cardiff branch of the County of Gloucester Bank, which is a banking company having branches at different places. The Cardiff branch sent the bill to their London agents, the London and Westminster Bank, by whom it was presented for payment in London on Saturday, November 10, 1894, and it came back into their hands in the afternoon, so that they had until Monday, November 12, to give notice of dishonour, and on that day they sent notice. By mistake this notice was sent to the Cirencester branch of the County of Gloucester Bank, and not to the Cardiff branch. On the morning of Tuesday, November 13, the London bankers had discovered the mistake, and they telegraphed to the Cardiff branch, giving them notice that the bill was dishonoured.

(1) (1843) 12 M. & W. 51; 13 L. J. (Ex.) 17.

What happened after this was that due notice was given in succession by the Cardiff branch, and then all the way down the line of indorsers till the defendant, who now appeals, was reached, though she got notice of dishonour in due time. The question raised is whether there was a blot in the proceedings by reason of notice not having been given on Monday the 12th to the Cardiff branch; the notice having, as I have said, been misdirected to the Cirencester branch. To ascertain this we must refer to the Bills of Exchange Act, 1882, s. 49. By sub-s. 5 the notice may be given in writing or by personal communication, and in any terms which sufficiently identify the bill and intimate that it has been dishonoured by non-acceptance or non-payment, and I refer to this for the purpose of shewing that there is no magic about a notice of dishonour, but that it may be sent by post or in any other way. Then, by sub-s. 12, the notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter. It is further provided that in the absence of special circumstances—and I think there were no special circumstances proved in this case—notice is not to have been deemed to have been given within a reasonable time unless, "where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day; and if there be no such post on that day, then by the next post thereafter." Speaking for myself, I think that the notice would be good if on the day after the dishonour of a bill the person giving the notice were to telegraph to the person to receive the notice in terms which sufficiently identified the bill and intimated that it had been dishonoured. It appears that the London and Westminster Bank gave what would be a proper notice of dishonour to the County of Gloucester Bank, though by mistake the notice was addressed to the wrong branch of that bank. It seems to me that we should be frittering away the provisions of the statute if we were to hold that a mistake in an address could not be rectified, if the effect of the rectification is that the person to whom notice is sent in point of fact gets notice in due course and in due time. It is said that the

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sending of the notice and the sending of the telegram were disjunctive acts, and that, the notice of Monday being sent to the wrong place and the telegram of Tuesday being too late, no proper notice has been proved. I cannot bring myself to disconnect these two acts, and, although the written notice of Monday is not shewn to have been properly directed, I think the mistake was rectified in due time by the telegram of the next day. I think, therefore, that the appeal should be dismissed.

RIGBY L.J. I am of the same opinion. A notice of dishonour is not required to be in any particular form—it may be by writing or by personal communication, and may be in any terms provided it gives the necessary information. It was plainly intended to give the widest discretion as to the form of the notice. If there were anything in the Act which declared that the address of the person who is to receive the notice is material, different considerations would arise. For my part, I think it is not material that the notice has been wrongly addressed, provided that this has not prevented it getting to the proper person within the proper time.

With regard to the facts of this case, I agree that there are no special circumstances to be considered. The notice has been sent to the County of Gloucester Bank at one of their many addresses, and received there and acted upon without objection, and the question is whether it was sent to them in time. With regard to the giving of notice, agents are treated successively as if they were holders. Can it be said that if the County of Gloucester Bank had themselves been indorsers they would not have been liable had the notice come in an irregular manner into their hands but in proper time? If this cannot be said, I do not think the notice should be held to be ineffectual in a case in which the bank are not parties to the bill. In fact, the Cardiff branch knew of the dishonour of the bill on Tuesday, November 13, in time to give notice on the proper date—the 14th. To hold that notice directed to the right person but sent to a wrong address must necessarily be invalid would be to go to an extreme length, and make it appear that a right address is an essential part of the notice.

There may be no address, or the address would not be material if a person carrying the notice with a wrong address met the person to whom it was directed and delivered it to him.

I think the notice was sufficient whether the Cardiff branch is treated as separate from and independent of the Cirencester branch or not. The latter bank received due notice on the 13th, and the Cardiff branch knew of the dishonour of the bill and of the notice on the same day, and by reason of the action of the Cirencester branch were enabled to do exactly what was necessary. Notice of dishonour reached the defendant at the proper time, and what was done was precisely what is required by the statute. Under these circumstances it seems to me impossible to say that there was a failure in one of the links of the chain of notices; and if so it follows that the plaintiffs are entitled to retain the judgment in their favour.

COLLINS L.J. I have the misfortune to differ from the other members of the Court on a point in this case which is of importance, and the conclusion I have come to is that the appeal should be allowed.

In the case of a bill of exchange any one who is entitled to notice of dishonour may rely on a prior breach by any one of the persons required to give notice. This is established by the cases, and was not disputed in the argument. Another general observation is that the requirements as to notice of dishonour are arbitrary and highly technical, but they have long been settled by authority, and are now crystallized into statutory rules. It was long ago held that knowledge is not equivalent to receipt of notice: see *Caunt* v. *Thompson*. (1) It would unsettle the practice of merchants if these rules were not strictly observed.

The point on which I differ is the question whether different branches of a bank are to be treated as one and the same person for the purpose of giving and receiving notice of dishonour. I think the judgments that have been given involve the proposition that they may be treated as one. I am clearly of opinion that they cannot. The point was decided in *Clode* v.

(1) (1849) 7 C. B. 400.

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Collins L.J.

*Bayley* (1) more than fifty years ago, in which case it was treated as resting on long-established practice. In *Prince* v. *Oriental Bank Corporation* (2) Sir Montague Smith in delivering the judgment of the Privy Council refers with approval to *Clode* v. *Bayley*. (1) He says, speaking of that case: "It was held that for the purpose of estimating the time at which notice of dishonour should be given, the different branches were for that purpose to be regarded as distinct. In considering whether notice of dishonour was given in time, it was thought reasonable that the bill should be sent successively to the branch banks through which it had come to the principal bank, before giving the notice. It was pointed out by Lord Abinger that it was not possible for the bank in London to know from whom the bill came; therefore it was necessary, in the ordinary course of the transaction of business, that it should be sent to the branches before notice of dishonour could properly be given." In *Clode* v. *Bayley* (1) there was an indorsement of the bill to one of the branch banks; but that fact does not affect the principle upon which the decision is based, and, indeed, as between two of the branches, there was no indorsement. In the course of the argument in that case it was said: "The only question is, whether, this bank having two subordinate branches, each of the three establishments is to be considered as a separate holder, and entitled to notice of dishonour, or whether it is not to be considered as one and the same establishment." That seems to me to be the point before us, and the submission that the bank and its branches were to be considered as one establishment was unsuccessful. In *Bray* v. *Hadwen* (3) the banker was held to be entitled to one whole day for the purpose of giving notice, as in the case of an ordinary person into whose hands a dishonoured bill comes.

Under s. 49, sub-s. 8, of the Bills of Exchange Act, 1882, "where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf." In this case the London and Westminster Bank was agent to present the bill, and had no other

(1) 12 M. & W. 51; 13 L. J. (Ex.) 17. (2) (1878) 3 App. Cas. 325.
(3) (1816) 5 M. & S. 68.

principal for the purpose of giving notice of dishonour but the Cardiff branch from which the bill was received; but they sent notice to a branch to which they were not responsible. Such a notice, in my opinion, is ineffective, and must be put out of consideration. If it were not so, it would follow that notice to one branch of a bank would be notice to all branches, and this even though a branch might be in a remote part of the kingdom, or, for anything I know, out of the kingdom.

It has been contended that the London and Westminster Bank sent notice on the 12th, because on that day they posted one to the County of Gloucester Bank at their Cirencester branch; but on the authorities I have cited this was not notice to the Cardiff branch. It is said to have been a notice sent to the right person at a wrong address. That, in my judgment, would not make it a better notice than if it had been sent to the wrong person. In fact, it was not sent to the right person; it was sent to the Cirencester branch, which, for this purpose, was the wrong person, and there is no evidence that it ever reached the Cardiff branch. This notice, therefore, may be wiped out of the discussion. It has been sought to eke out this defective notice by means of the telegram which was sent to the Cardiff branch on the following day; but, within the terms of the section, that telegram was clearly not in itself a good notice; and to this my learned brothers agree. How does it become any better from the fact that an abortive attempt to send a good notice had been made the day before? The defendant Mrs. Edwards did, in point of fact, receive notice as soon as she would have done if there had been no break in the chain; but the cases have decided that she is nevertheless entitled to take advantage of the break. I think, therefore, that the appeal should be allowed.

*Appeal dismissed.*

Solicitors for plaintiffs: *Windybank, Samuell & Behrend.*
Solicitor for defendants: *G. J. Brocklesby.*

A. M.

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*Oct.* 30.

[IN THE COURT OF APPEAL.]

## PENTON *v.* BARNETT.

*Landlord and Tenant—Covenant to Repair—Notice of Breach—Continuing Breach—Breach after expiration of Notice—Right to Re-enter—Rent due before Action—Joinder of Claim for Possession and Claim for Rent—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-s.* 1.

A lease contained a general covenant to repair and a covenant to repair within three months after notice. The premises being out of repair, the lessor gave notice to the lessee under the Conveyancing Act, 1881, to repair within a given time. Three days after the expiration of the notice a quarter's rent became due. No repairs having been done by the tenant, the lessor brought an action to recover possession, and in the action claimed the quarter's rent:—

*Held*, that, the breach of covenant being a continuing one, no new notice was required in respect of the non-repair after the expiration of the time specified in the notice, and that the claim for rent did not affect the right to possession in respect of non-repair after the date when the rent fell due.

Appeal from a judgment of Ridley J. at the trial without a jury.

The writ in the action was dated January 14, 1897, and indorsed with a claim for possession of premises described, damages for breach of covenant, arrears of rent, and mesne profits.

By an indenture of July 17, 1873, the premises were demised by the plaintiff's predecessor in title for a term of years, at an annual rent payable quarterly on the usual quarter-days. The tenant covenanted to build a workshop and make certain alterations in the premises, and put them in thorough repair, and keep and preserve them in good and substantial repair and condition. The lease also gave power to the lessor to enter upon the premises and see their condition, and in the event of their being out of repair to give notice requiring the defects to be made good, and the lessee covenanted to repair within three calendar months after such notice was given. The lease contained a power of re-entry for breach of any covenant.

The statement of claim set out the covenants above mentioned, and stated that the plaintiff was entitled to the reversion expectant on the termination of the lease, and that the term became vested in the defendant. It also set out that the defendant had broken the covenants to repair and maintain the premises, and that on September 22, 1896, the plaintiff gave the defendant notice in writing requiring him to execute the repairs specified in the schedule thereto within three months from the date of the notice, and to make compensation by payment to the plaintiff of 20*l*. It was averred that the defendant had failed to comply with the requirements of the notice, and also that he had not paid the rent due on December 25, 1896. The plaintiff claimed possession, a quarter's rent due December 25, 1896, mesne profits from December 25, 1896, until judgment, and damages for breaches of the covenants.

The defence contained, among other matters, the statement that the defendant would object that, by bringing this action to recover rent which accrued due after the alleged causes of forfeiture by reason of the alleged breaches of covenant to repair, with knowledge thereof, the plaintiff had waived the alleged forfeiture, and was not entitled to recover possession of the premises. The rent due on December 25, 1896, was brought into court.

At the trial judgment was given for the defendant.

The plaintiff appealed.

*R. Wallace, Q.C.*, and *J. D. Crawford*, for the plaintiff. It was not contested that when the writ was issued on January 14, 1897, the premises were still out of repair. From that date the plaintiff must be taken to have elected to treat the breach of covenant as a forfeiture, and to claim possession: *Jones* v. *Carter* (1); but that does not affect his right to bring an action for the rent which accrued on December 25, 1896: *Hartshorne* v. *Watson*. (2) Between that date and the issue of the writ there was a recurring or continuing breach of the general covenant to repair, as in *Fryett* v. *Jeffreys*. (3) This case differs

(1) (1846) 15 M. & W. 718. (2) (1838) 4 Bing. N. C. 178.
(3) (1795) 1 Esp. 393.

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from *Dendy* v. *Nicholl* (1), for there the breach complained of took place once for all, and the lessor, by bringing an action for rent with notice of the breach, was taken to have waived his right of re-entry. Even if it were held that the plaintiff had improperly claimed rent in this action, that ought not to affect his right to recover possession.

*H. D. Greene, Q.C.*, and *Poulter*, for the defendant. The learned judge decided in accordance with a judgment of Wright J. in *Bevan* v. *Barnett*. (2) In that case, though it does not appear by the report that the matter was argued, the dates shew that the question of there being a continuing breach was involved. In this case the plaintiff had an option to treat the defendant as a trespasser after December 22, 1896, when the three months' notice expired, and he ought to have sued for the rent up to that date only. For three days up to December 25 he has, by claiming rent, treated the defendant as his tenant. The breaches after December 22 were not the same as those alleged in the notice, for the condition of the premises must have been altered in the interval, and there has been no fresh notice under the Conveyancing Act, 1881 (3), relating to the fresh breaches. If the plaintiff is to recover possession in this action, it would follow that he might receive rent for several years and then fall back upon his original notice and eject the defendant. It cannot be that the notice is to stand good for an indefinite time although rent has been paid and accepted. He has a right of action for the breach after December 22, but he cannot recover possession from the defendant for it without a proper notice under the Conveyancing Act.

(1) (1858) 4 C. B. (N.S.) 376.

(2) (1897) 13 Times L. R. 310.

(3) 44 & 45 Vict. c. 41, s. 14, sub-s. 1: "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for breach of any covenant or condition in the lease, shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

A. L. SMITH L.J. I have come to the conclusion that this appeal should be allowed. A lease was granted in 1873 which contained a general covenant to keep and preserve the demised premises in good and substantial repair and condition, and also a covenant to repair on notice. In 1896 the premises were confessedly out of repair, and on September 22 the plaintiff gave to the defendant a notice under the Conveyancing Act to execute the repairs specified in the notice within three months. It is clear that it was a notice under the Act, because it is so headed and it claimed compensation, which could only be done under the Act. On January 14, 1897, more than three months had elapsed, and the landlord issued a writ against the tenant in which he claimed possession, and he also set up a claim for rent which was amplified in the statement of claim to a demand for rent up to the previous December 25. It is conceded that the notice was not complied with, and that at the date of the writ the premises were in the same state of disrepair as at the time of the notice. The case went to trial, and an objection was taken that by claiming in the action rent up to December 25 the plaintiff had affirmed the tenancy at that date. It is perfectly well settled that the acceptance of rent is an acknowledgment of the existence of the tenancy, and if the case depended solely on that, I should have thought that the action was not maintainable; but it is pointed out that the claim for rent is at most an election to treat the defendant as tenant up to December 25, and that, inasmuch as between that date and January 14 following the premises were in the same state of disrepair in which they had previously been, there was a breach of covenant between those dates in respect of which the plaintiff could maintain his action for possession. In my opinion, apart from the Conveyancing Act, this contention is well founded. But then it is said that we must deal with s. 14 of the Conveyancing Act, 1881. Under that Act a right of re-entry for breach of covenant is not enforceable unless the lessor serves on the tenant a notice specifying the particular breach complained of, so that the tenant may have a reasonable time to remedy the breach and make reasonable compensation to the lessor. The defendant had such a notice, and a reasonable time in which to comply

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A. L. Smith L.J.

with it; but it is said that the notice does not cover the breaches between December 25 and January 14. In my opinion this answer is insufficient, because the breaches during this latter period are the same as those in respect of which the notice was given. We have been referred to the case of *Bevan* v. *Barnett* (1), but from the meagre report of that case I cannot gather what were the facts upon which my brother Wright J. decided it. In my opinion, the learned judge in this case was wrong in holding that the plaintiff could not recover possession, and the appeal must be allowed.

RIGBY L.J. I am of the same opinion. This is the case of a lease which contained two covenants as to repairs—one a general covenant to repair as occasion should require, the other to repair within three months after notice. The power of re-entry applies to breaches of either of these covenants. Independently of the Conveyancing Act, directly the premises were out of repair the landlord had a right of re-entry under the lease; but he was not bound to re-enter on any particular day. At any rate, he had the power of re-entry so long as there was a broken covenant and a continuing breach. The position on January 14, 1897, would be that, as nothing had been done since the notice as to repairs, the plaintiff had the right to determine the tenancy by the issue of the writ, and to sue in respect of such rights as had accrued to him during the tenancy. Then, dealing with the Conveyancing Act, the effect of s. 14 is that the right of re-entry for breach of covenants in a lease is not to be exercised unless notice has been given of the breaches complained of, and a reasonable time has elapsed for the tenant to comply with the notice. Such a notice was given on September 22—one obviously intended to be a notice under the Act. It cannot be doubted that the time indicated by the notice was a reasonable time, for it is the time specified in one of the covenants to repair contained in the lease. The action could therefore be maintained by the lessor—that is to say, the conditions imposed by the Act had been complied with, and for the purposes of this case the lessor was in the same position as if

(1) 13 Times L. R. 310.

there had been no legislation. Then he brought his action for possession, and in it he claimed for a quarter's rent due on the previous December 25. In my opinion, this claim does not constitute a waiver of the forfeiture. All that was laid down in *Dendy* v. *Nicholl* (1) was that an action for rent was as good as a waiver of forfeiture as an action of ejectment was as a determination of the tenancy. If there had not been a recurring breach, but something which had happened once for all, the state of things might have been different; but in this case, in my opinion, there is nothing in the statement of claim inconsistent with an election to determine the lease from December 25.

COLLINS L.J. I am of the same opinion. It is not now denied that there was a breach which may be described as continuing or accruing day by day. That being so, but for the Conveyancing Act there would be no answer to the claim for possession. Undoubtedly the words of the statute do give rise to the contention put forward on behalf of the defendant. It is said that the breach of covenant in respect of which this action to recover possession is brought is not the antecedent failure to repair in respect of which three months' notice was given on September 22, but the failure to repair day by day after December 25, and that in respect of this a fresh notice must be given. If the section is to be construed with a great degree of strictness, that might be so. I think, however, that we ought to construe the words "particular breach" in the section according to the obvious intention of the Legislature, which was that the tenant should be informed of the particular condition of the premises which he was required to remedy. The expression "breach" means the neglect to deal with the condition of the premises so pointed out, and not merely failure to comply with the covenants of the lease. The common sense of the matter is, that the tenant is to have full notice of what he is required to do. He has had notice, and has failed to act on it; and with regard to that the physical condition of the premises which he was required to make good was the same when

(1) 4 C. B. (N.S.) 376.

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the action was brought as when the notice was given. Under these circumstances, I agree that the requirements of the Conveyancing Act have been complied with, and that the tenant has, within the meaning of s. 14, had notice of the breach of covenant which is the foundation of the action. I entirely agree with the judgments that have been given by the Lords Justices. With regard to *Bevan* v. *Barnett* (1), so far as I can follow the case from the report, the point involved in the present case did not arise.

*Appeal allowed.*

Solicitors for plaintiff: *Lee & Pembertons.*
Solicitors for defendant: *Finch & Turner.*

A. M.

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1897
*Dec.* 7, 13.

## *In re* GILBERT.
## *Ex parte* GILBERT.

*Bankruptcy—Insolvent Testator—Debt due to Executor—Retainer in Specie—Administration Order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 125, *sub-ss.* 1, 9.

When the debt due to the executor of an insolvent testator exceeds the value of the testator's assets, the executor is not bound to realize the assets, i.e., convert them into money, before exercising his right of retainer, but is entitled to retain the assets in specie in satisfaction of his debt.

*Woodward* v. *Darcy*, (1557) 1 Plow. 184, and *Chapman* v. *Turner*, (1738) 9 Mod. 268; S. C. Vin. Abr. Exor. D. 2, p. 72, discussed.

THIS was an application which raised the question as to the right of an executrix to retain in specie the assets of her testator in payment of his debt to her.

On September 2, 1897, H. F. Gilbert died insolvent, having by his will appointed his wife and a Mr. Edwards executrix and executor of his will.

At the time of his death the testator was engaged in a small way of business as a clothier, and his only assets were the leasehold business premises, the stock-in-trade, a few book debts, and some household effects, which altogether were valued

(1) 13 Times L. R. 310.

at 292*l.* for the purposes of probate. His debts exceeded 1600*l.*, of which 870*l.* was due to his wife.

On September 15 his wife proved the will alone, Mr. Edwards having renounced probate, and took possession of the business premises and assets, and continued to carry on the business on her own account and for her own benefit.

On September 20 Messrs. Cook & Son, creditors of the testator, applied to Mrs. Gilbert for particulars of her husband's estate, to which she replied through her solicitor, Mr. Millar, by letter dated September 21, claiming to retain all the assets against her debt of 870*l.*

On September 25 Messrs. Cook & Son presented a petition under s. 125 of the Bankruptcy Act, 1883, that the testator's estate might be administered in bankruptcy, and obtained the usual order, and a Mr. Nicholson became the trustee in bankruptcy.

On October 12 Mr. Nicholson, under an order of the Bankruptcy Court, claimed possession of the leasehold premises and business; and thereupon Mrs. Gilbert reluctantly gave up possession to him. She now applied to the Court for a declaration that she was entitled to the property in question, and that the trustee might be ordered to deliver up the same to her.

*Stevens*, for the application. This property was not the property of the trustee at the commencement of the bankruptcy, i.e., the date of the petition, because at that date it had been already retained by the executrix to satisfy the debt due to her by her deceased husband, and notice of such retainer was given to Messrs. Cook & Son before they presented their petition. As to her right to retain: by the probate the assets vested in her as executrix by operation of law, and she was thereupon entitled to appropriate and retain them in specie in satisfaction of her debt, which was much larger than the value of the assets; she was not bound to realize before she retained: Williams on Executors, 9th ed. p. 568; *Woodward* v. *Darcy* (1); *Elliott* v. *Kemp*. (2) No overt act of appropriation was necessary to sustain the retainer; but if it were, her taking possession and

(1) 1 Plow. 184.

(2) (1840) 7 M. & W. 306, 313.

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the letter of her solicitor of September 21 were sufficient for the purpose.

*Carrington*, for the trustee in bankruptcy. The property did not vest in the executrix by mere operation of law; there must be something more. The executor's right of retainer does not arise on possession, but on the right to pay himself out of moneys in his hands. He cannot do that by retaining the assets in specie. He must realize the assets before he can set up his right to retain. The principle of *In re Compton* (1) applies, where it was held that an executor of an executor could not set up the right to retain in respect of book debts which the executor had not collected in his lifetime. Here there are book debts. There are also stock-in-trade and the lease, which it is submitted are on the same footing as book debts. *Woodward* v. *Darcy* (2) is a statement of opinions, and not a clear decision on the point of retainer in specie. It is not cited in Walker and Elgood on Executors, and is criticised in Wentworth on Executors, p. 31.

[WRIGHT J. referred to Williams on Executors, 9th ed. p. 568.]

The rule of retainer is laid down in *Chapman* v. *Turner* (3): "an administrator or executor cannot pay debts with the specific goods or effects of a testator or intestate, but he must sell those goods or effects, and pay the debt with the money arising from such sale."

[WRIGHT J. That case is better reported in Vin. Abr. Exor. D. 2, p. 72, where the passage you have read does not appear, and there is nothing in the judgment to shew that an executor must sell before he can retain.]

It is submitted that the principle is the same, and that the judgment of Cotton L.J. in *In re Compton* (1) involves realization, i.e., getting in the estate, before retainer.

[*Hearn* v. *Wells* (4) and *In re Illidge* (5) were also referred to.]

*Stevens*, in reply. *Woodward* v. *Darcy* (2) is cited as an

(1) (1885) 30 Ch. D. 15.
(2) 1 Plow. 184.
(3) 9 Mod. 268.
(4) (1844) 1 Coll. 323.
(5) (1884) 27 Ch. D. 478.

authority in Vin. Abr. Property, G. pl. 1. As to the outstanding book debts, they are of small amount and doubtful value, and the executrix does not claim them. As to the rest of the estate, there is clear evidence of retainer.

WRIGHT J. This is a curious question to decide, and it is strange there is so little authority upon it. The testator died in September last, owing his wife about 870*l.* After his death his wife, who was his executrix, took possession of his house and stock-in-trade, and carried on the business as before as her own. She kept possession of the furniture and collected some of the book debts, and the value of the whole estate is stated by her at 300*l.*, which sum is greatly less than the amount due to her, and that statement is not challenged by the trustee. Whilst she was in possession of the estate some of the other creditors of the testator put questions to her, and she went to her solicitor, and was advised by him that she could retain the estate in payment of her debt; and it seems to me that, if she had a right to retain, her solicitor's letter of September 21 is sufficient evidence of her election to retain. Three weeks afterwards, the trustee appointed under the administration order came and claimed possession of the house and business, and after some demur she gave up possession to him. But this makes no difference, because, according to the authorities collected in Williams on Executors, 9th ed. p. 568, if the intention to retain is declared before possession is taken by the trustee, such possession does not affect the executor's right of retainer. The question, therefore, is reduced to one of law. First, it is said on behalf of the executrix that, on the death of the testator, she being both executrix and creditor, the result was that the estate vested in her by operation of law, and the ancient case of *Woodward* v. *Darcy* (1) is cited as an authority for that proposition. That case is mentioned in Williams on Executors, 9th ed. p. 568, with approval. But I do not think it necessary in this case to decide that point, nor do I think it desirable. I doubt whether it is the law now that the property in the assets is absolutely altered without something shewing

(1) 1 Plow. 184.

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GILBERT, *In re.* GILBERT, *Ex parte.*

Wright J.

assent or appropriation by the executor. But, as I said, I do not think it is necessary to decide that point, and I am glad to be relieved from doing it, because on the point of retainer I think the executrix here is entitled to all the estate. It is said she cannot retain the assets in specie, but must realize the assets—that is, sell them before she can pay herself by exercising her right of retainer. If the assets had been of greater value than her debt, it might very well be that she was not entitled to retain before she had realized or unless she had clearly appropriated some specific assets in payment of her debt. But here the assets are of much less value than her debt; and it seems to me, in the absence of authority, that it would not be reasonable to hold that she was bound to go through the form of selling before she could pay herself. There is no authority that she ought, except the statement in *Chapman* v. *Turner*. (1) But that report is most unsatisfactory, and does not accord with the same case as reported in Vin. Abr. Exor. D. 2, p. 72, which is the only report referred to in Williams on Executors. In the absence of such authority, therefore, I think I ought not to hold that the executrix is bound to realize before she can exercise her right to retain. My judgment is confined to the case where the value of the whole of the assets is less than the debt due to the executor. I should have felt some difficulty as to the outstanding book debts in the face of the judgment of Cotton L.J. in the case of *In re Compton* (2); but I am relieved from that, because the executrix does not press her claim to them. I think she is entitled to all the rest of the estate. I see no reason to separate the lease of the premises from the rest of the assets. I think she took possession of the leasehold premises and business generally, including the furniture and stock-in-trade. Under the circumstances there will be no order as to costs.

Solicitor for executrix: *W. R. Millar.*
Solicitors for trustee: *J. N. Mason & Co.*

(1) 9 Mod. 268.

(2) 30 Ch. D. 15.

H. L. F.

## *In re* HUNT.
## *Ex parte* THE BOARD OF TRADE.

1897
*Dec.* 13.

*Bankruptcy—Practice—Costs of Stranger to the Bankruptcy—Taxation—Power of Board of Trade to Review—Bankruptcy Rules*, 1886 *and* 1890, *r.* 124 *—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 73, *sub-s.* 3.

Rule 124 of the Bankruptcy Rules, 1886 and 1890, which empowers the Board of Trade to have "any bill of costs, charges, fees or disbursements of any solicitor, manager, accountant, auctioneer, broker, or other person," which has been taxed by a registrar of a county court, reviewed by a bankruptcy taxing master of the High Court, does not apply to persons litigating with the trustee outside the bankruptcy, but is confined to the class of persons enumerated in the rule and employed by the trustee in the bankruptcy.

THIS was an application which raised the question as to the right of the Board of Trade to have the taxation of a certain bill of costs reviewed under these circumstances.

In June, 1897, an application by the official receiver, as trustee in the bankruptcy, to the judge of the county court at Derby against one George Brown to recover for the benefit of the estate the sum of 49*l.*, the agreed value of a stack of hay, on the ground that such stack of hay was at the commencement of the bankruptcy in the order and disposition of the bankrupt, was dismissed with costs; and it was ordered that the official receiver might reimburse himself out of the estate not only the respondent's costs, but also his own costs of the motion.

The registrar of the county court taxed and allowed the respondent's costs of the motion at 48*l.* 18*s.*

The Board of Trade considered that the registrar's allowances were generally excessive, and gave notice to the respondent's solicitors, pursuant to rule 124 of the Bankruptcy Rules, 1886 and 1890, that they required the registrar's taxation to be reviewed by the bankruptcy taxing master of the High Court.

The bankruptcy taxing master refused to review the taxation on the ground that he had no jurisdiction. Thereupon the Board of Trade applied that the bankruptcy taxing master

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of the High Court might be ordered to proceed to review the taxation.

*Muir Mackenzie*, for the Board of Trade. Rule 124 is an extension of the power given by sub-s. 3 of s. 73 of the Bankruptcy Act, 1883, and is intended to apply to a case like the present. The words "any bill of costs . . . . of any solicitor" are wide enough for the purpose. If it were not so, the Board of Trade would have no check on the bills of costs of strangers payable out of the estate.

*W. Appleton*, for the solicitors. Rule 124 does not apply to the costs of proceedings taken by a trustee against a stranger to the bankruptcy. The rule only applies to the costs, &c., of such solicitors and others enumerated in the rule as are employed in the bankruptcy. Rule 117 confirms this view. [He referred to *In re Dowson* (1); *Ex parte Angerstein*. (2)]

*Muir Mackenzie*, in reply.

WRIGHT J. I must confess that I was inclined to agree with Mr. Muir Mackenzie at first sight that rule 124 taken by itself would warrant the application that is made; but Mr. Appleton has altered my view in that respect. I think that he is right when you take the three things together—rule 124, s. 73, and sub-s. 3. The last part of that sub-section appears to me to indicate strongly that it is referring to the charges of those persons whose employment requires sanction: "The taxing master shall satisfy himself before passing such bills and charges"—that is, all bills and charges of solicitors, managers, accountants, auctioneers, brokers, and other persons, not being trustees—"that the employment of such solicitors and other persons in respect of the particular matters out of which such charges arise, has been duly sanctioned." When you come to rule 117 there is the same enumeration, and there again you find the same words: "Before taxing the bill or charges of any solicitor, manager, accountant, auctioneer, broker, or other person employed by an official receiver or trustee, the taxing officer shall require a certificate in writing signed by the official

(1) (1888) 21 Q. B. D. 417. (2) (1874) L. R. 9 Ch. 479.

receiver or trustee," and so forth. Then, when you come to rule 124, it is very difficult to suppose, when there is the same enumeration of persons, that it is referring to any different class of costs. The rule runs: "Where any bill of costs, charges, fees or disbursements of any solicitor, manager, accountant, auctioneer, broker, or other person has been taxed by a registrar of a county court the Board of Trade may require the taxation to be reviewed by a bankruptcy taxing master of the High Court" —exactly the same enumeration and presumably in relation to the same people. And then, what appears to me to clinch it, is sub-s. 2 of that rule, which provides: "In any case in which the Board of Trade require such a review of taxation as is above mentioned they shall give notice to the person whose bill has been taxed and shall apply to the taxing master of the High Court to appoint a time for the review of such taxation, and thereupon the taxing master of the High Court shall appoint a time for the review of, and shall review such taxation." It does not appear to me, having regard to the collocation of the section and rules to which I have referred, that that means a notice to be given to any one except the kind of persons enumerated. I do not think it provides for notice to be given to strangers. On the whole, I hold the true construction is that it is confined to the kind of persons enumerated in sub-s. 3 of s. 73. The motion must be dismissed with costs.

Solicitor for Board of Trade: *Murton.*

Solicitors for respondent: *Robotham, Attwood & Robotham, Derby.*

H. L. F.

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*Jan.* 18.

## *In re* COLE.
## *Ex parte* ATTENBOROUGH.

*Bankruptcy—Bankruptcy Notice—Application to set aside—Adjournment of Hearing—Ground for setting aside—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Bankruptcy Rules*, 1886 *and* 1890, *Rules* 138 (2), 139, *Form* 8.

An adjournment of the hearing of an application to set aside a bankruptcy notice cannot be granted to the judgment debtor, unless, upon the application for adjournment, sufficient ground, within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, and Rules 138 (2), 139, and Form 8 of the Bankruptcy Rules, 1886 and 1890, is shewn for setting aside the bankruptcy notice.

APPEAL by the judgment creditor, Robert Percy Attenborough, against an order dated January 14, 1898, of the judge of the Brentford County Court, adjourning to January 29, 1898, the hearing of an application by the judgment debtor, Charles Shirley Cole, to set aside a bankruptcy notice, dated December 20, 1897, the material terms of which were as follows :—

"Take notice that within seven days of the service of this notice on you you must pay to R. P. Attenborough the sum of 1839*l.* 4*s.* 2*d.*, claimed as being the amount due on a final judgment obtained against you in the Queen's Bench Division of the High Court dated 20th December, 1897, whereon execution has not been stayed; or you must secure or compound for the said sum to his satisfaction, or to the satisfaction of the Court; or you must satisfy the Court that you have a counter-claim, set-off, or cross-demand, against the said Attenborough, which equals or exceeds the sum claimed, and which you could not set up in the action in which judgment was obtained."

The notice was indorsed as required by rule 138 (2.).

The debtor filed an affidavit, in which he stated that friends of his were willing, and had offered, to pay to the creditor the whole balance owing to him, on receiving from him certain securities, which he held, and which they were willing to hold for the benefit of the persons from whom the creditor took the

security, and they would undertake not to deal with the security pending the decision in a certain Chancery action. The debtor further stated that he was personally unable to pay the judgment creditor until the security held by the creditor was realized, when he could pay all his debts in full.

The judgment creditor gave notice of motion that the order, adjourning the application of the debtor to set aside the bankruptcy notice, be discharged, and that the application of the debtor to set aside the bankruptcy notice be dismissed, upon the grounds (amongst others) that execution had not been stayed upon the judgment, and that the debtor had not complied with the requirements of the notice, nor satisfied the Court that he had a counter-claim, set-off, or cross-demand, which equalled or exceeded the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained. (1)

(1) By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1, "A debtor commits an act of bankruptcy. . . . (*g*) If a creditor has obtained a final judgment against him for any amount, and execution thereof not having been stayed, has served on him. . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, . . . . either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off, or cross-demand, which equals or exceeds the amount of the judgment debt, and which he could not set up in the action in which the judgment was obtained."

By the Bankruptcy Rules, 1886 and 1890, rule 138 (2), "There shall also be indorsed on every bankruptcy notice an intimation to the debtor that if he has a counter-claim, set-off, or cross-demand, which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment was obtained, he must, within the time specified in the notice, file an affidavit to that effect with the registrar."

Rule 139: "The filing of such affidavit shall operate as an application to set aside the bankruptcy notice, . . . . and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined."

Form 8—"Affidavit on application to set aside Bankruptcy Notice"—states that the debtor has satisfied the debt, "*or*, That I have a counter-claim, [or set-off, *or* cross-demand] for £——, being a sum equal to [*or* exceeding] the claim of the said —— in respect of, &c.

"That I could not have set up the said counter-claim, &c., in the action in which the said judgment was obtained against me."

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*Herbert Reed, Q.C.* (*C. L. Attenborough* with him), for the appellant. The order for adjournment is wrong, and the application to set aside the bankruptcy notice ought to be dismissed. The affidavit required by rule 139 operates as an application to set aside the bankruptcy notice, but only in cases where the requirements of the Act and Rules have been complied with. On an application to set aside a bankruptcy notice the judgment debtor cannot go behind the judgment. If he wishes to do so, he must wait until the hearing of the petition. If the judgment debt has not been satisfied, the only ground on which a bankruptcy notice can be set aside is that specified in s. 4, sub-s. 1 (*g*) of the Bankruptcy Act, 1883, and rule 138 (2.), namely, the existence of a counter-claim, set-off, or cross-demand, which the debtor could not have set up in the action: *In re Easton, Ex parte Dixon.* (1)

*Muir Mackenzie* (*Bonsey* with him), for the respondent. The county court judge had jurisdiction to extend the time for hearing the debtor's application, for by the Bankruptcy Act, 1883, s. 105, sub-s. 2, "The Court may at any time adjourn any proceedings before it upon such terms, if any, as it may think fit to impose." This clause has been held to apply even in a case under s. 20, where the words are "shall adjudge the debtor bankrupt": *In re Lord Thurlow, Ex parte Official Receiver.* (2)

[WRIGHT J. In rule 139 the words are "such affidavit." Surely that must mean the affidavit specified in rule 138 (2.).]

This is really an appeal against the exercise of the county court judge's discretion. [He also referred to *In re Kelday, Ex parte Meston.* (3)]

*Herbert Reed, Q.C.*, was not heard in reply.

WRIGHT J. This appeal raises a very important point of practice. In my opinion the safer course is to adhere to the literal construction of the Bankruptcy Act and Rules. It is not disputed that the notice served in the present case is a good bankruptcy notice: there can be no question as to that.

(1) (1893) 10 Morrell, 111. (2) [1895] 1 Q. B. 724.
(3) (1888) 36 W. R. 585.

The application to set it aside does not come within the last words of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, nor is it within the terms of rule 138 (2.) or rule 139, or of Form 8; nor is the application made on the ground that the bankruptcy notice is informal, and does not comply with the requirements of the Act, nor on the ground that injustice will be done if the creditor is allowed to proceed under the notice, but only on the ground that it would be fair and right if indulgence were granted to the debtor, so as to allow him time to make the proposed arrangement. But that is not enough to justify the Court in supporting this order for an adjournment. The power to set aside a bankruptcy notice is confined to the grounds mentioned in the Act and Rules. In the case of *In re Easton, Ex parte Dixon* (1), Vaughan Williams J. said: "Where it is a bankruptcy notice, it seems to me the only reasons which can be entertained by the registrar are the reasons which are mentioned in s. 4, sub-s. 1 (*g*), viz., that the debtor has a counterclaim, set-off, or cross-demand, which he could not set up in the action in which judgment was obtained." In *In re Kelday, Ex parte Meston* (2), it was held that an equitable mortgagee, who had obtained a foreclosure decree, and an order for sale, which order could not be carried out, was entitled to serve a bankruptcy notice on the debtor, and there was no ground for an adjournment of the petition under rule 139. The expressions used by the Court of Appeal in that case go a long way to shew that there ought not to be an adjournment, unless some good ground is suggested for setting aside the bankruptcy notice, and that ground ought in all cases to be shewn on affidavit to the Court to which the application is made. The question as to whether there ought to be an order of adjudication can be raised on the hearing of the petition. For these reasons I am of opinion that the order adjourning the hearing of the debtor's application to set aside the bankruptcy notice was wrongly made, and ought to be set aside.

BRUCE J. I am of the same opinion. It seems to me that there is no injustice in this attempt on the part of the judgment

(1) 10 Morrell, 111. (2) 36 W. R. 585.

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creditor to enforce his judgment by means of a bankruptcy notice, and there is no ground for the adjournment of the proceedings. At some future time the point may possibly be raised that an order adjudging the debtor bankrupt ought not to be made.

*Appeal allowed. Leave to appeal granted.*

Solicitor for appellant: *S. J. Attenborough.*
Solicitor for respondent: *G. E. Bucknill.*

P. B. H.

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*Dec.* 10, 11, 21.

## RISHTON, APPELLANT *v.* HASLINGDEN CORPORATION, RESPONDENTS.

*Local Government—Local Authority—Powers—Sewering—"Street"—"Highway repairable by the Inhabitants at large"—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 5, 6.

The definition of "street" in the Private Street Works Act, 1892, s. 5, excludes "a highway repairable by the inhabitants at large."

By s. 6 an urban authority is empowered, with respect to streets, to do certain sewering works.

An urban authority proposed to do sewering works in a certain place in their borough. The place in question (which was called a street) was formed before 1816, and had always been open at both ends into highways, and the place and buildings had existed in the same condition for seventy years, and since its formation the way had been used by foot-passengers without interruption. Neither public nor private repairs were proved.

On a case stated on the hearing and determination by justices of objections to the proposed works:—

*Held*, that the place in question was not a "street," within the meaning of the Act, being a footway repairable by the inhabitants at large, and therefore the urban authority had no power to execute the proposed works.

CASE stated by justices.

Upon the hearing and determining by the justices of objections under the Private Street Works Act, 1892 (1), to the proposals

(1) 55 & 56 Vict. c. 57, ss. 2 and 3 provide for the adoption of the Act by urban sanitary authorities.

Sect. 6 empowers the urban authority to resolve, with respect to a street, or part of a street, to do certain private street works, including sewering, if not already done to their satisfaction.

Sect. 7 empowers owners of premises to object to the proposed works, upon

of the respondents, being the urban authority for the borough of Haslingden, with reference to the sewering of Back Pleasant Street in Haslingden, and the provisional apportionment of the expenses thereof, it was admitted that the Private Street Works Act, 1892, had been duly adopted by the authority, and that the usual notices had been duly served upon the owners of property fronting, adjoining, and abutting upon the street, and had been duly posted and advertised, and that notices of objections had been duly given by ten of the fifteen property owners included in the provisional apportionment.

The appellant was one of the ten objectors. The following were the grounds of objection stated by the appellant in his notice of objections:—

1. That Back Pleasant Street is not, or does not form part of, a street, within the meaning of the Private Street Works Act, 1892.

2. That Back Pleasant Street is a highway repairable by the inhabitants at large.

3. That the proposed works are unreasonable.

4. That Back Pleasant Street has already been sewered to the satisfaction of the Haslingden Urban Sanitary Authority.

The estimate for the work was admitted to be reasonable, and equitably apportioned amongst the various owners, but these objections were relied upon by the appellant, as shewing the non-liability of the owners to do or pay for the work, and were heard and decided by the justices, as hereinafter appears.

The streets and buildings referred to in this case have existed in their present condition and position for seventy years at least.

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certain specified grounds, including the first three grounds stated by the appellant in this case.

Sect. 8 provides for the hearing and determination of objections.

Sect. 10 provides for the provisional apportionment of expenses.

By s. 5, "The expression 'street' means (unless the context otherwise requires) a street as defined by the Public Health Acts, and not being a highway repairable by the inhabitants at large."

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4, "'Street' includes any highway (not being a turnpike road), and any public bridge (not being a county bridge), and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not."

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The questions raised by objections 1 and 2 were first considered.

It was admitted that Back Pleasant Street is a back street 147 yards in length, and varies in width, being 7 feet 6 inches wide at the top, and 8 feet 6 inches wide at the bottom end, nearest Deardengate, and forms the north-west portion of a plot of land taken by a building association in the year 1806 for the erection of fifty houses, that these houses were erected by such association between the years 1806 and 1816, when the houses were conveyed by the trustees of such association to the several members thereof, that the houses were built, twenty-five on each side of a new street, made by the association, called Pleasant Street, which is thirty-six feet wide, with the backs of one row of houses abutting upon a street known as Far Back Pleasant Street, and the backs of the other row of houses abutting upon Back Pleasant Street, that Pleasant Street and Back Pleasant Street each run from Deardengate, which is the main street of Haslingden, to Bury Road, which is one of the principal thoroughfares, that the houses erected by the association run the whole length of Pleasant Street and Back Pleasant Street, from Deardengate to Bury Road, that Back Pleasant Street and Pleasant Street were respectively formed as they now exist at the time of the erection of the houses by the association, that there was never any chain, gate, or other barrier or obstruction in, or at either end of, Back Pleasant Street, that there is a passage of 4 feet in width leading from Back Pleasant Street to Pleasant Street about halfway down the street, that the north-west boundary of Back Pleasant Street is a wall running the whole length of the street, which wall forms the boundary of the back-yards and conveniences of houses erected on the opposite side thereof, and which houses front to Hindle Street in the borough, that the wall forming the north-west boundary of the street belongs, from Bury Street to a point about halfway down Back Pleasant Street, to the owners on the Pleasant Street side thereof, and thenceforward unto Deardengate to the owners on the Hindle Street side thereof, that there are openings in that part of the wall which belongs to the owners on the Hindle Street side, for the empty-

ing of the ashpits and conveniences of their houses, and that that part of the wall has been kept in repair and rebuilt by the owners of property on the Pleasant Street side, and the other part by the owners of property on the Hindle Street side, and that since its formation Back Pleasant Street has been used by foot-passengers without interruption.

Evidence was given for the respondents. (1)

Upon this evidence it was submitted on behalf of the appellant that the respondents had made out no case, that the onus probandi was upon the respondents, and it was for them to shew that Back Pleasant Street was a street, within the meaning of the Private Street Works Act, 1892, and to do this, having regard to the definition of a street in the Act, they must shew, and had failed to shew, that it was not a highway repairable by the inhabitants at large. Further, that the evidence already given proved that Back Pleasant Street was a highway repairable by the public, inasmuch as it had been used by foot-passengers uninterruptedly for eighty years, and had never been repaired in any real sense by the private owners at any time.

Being satisfied that the evidence already given was, in the absence of rebutting evidence, sufficient for the respondents' purpose, the justices overruled the objection.

The appellant then called witnesses.

After hearing the appellant's evidence on this point (objections 1 and 2) the justices held that Back Pleasant Street had not at any time been used by the public as a thoroughfare, and was not a highway repairable by the public.

Evidence was then called by the respondents on the question raised by objections 3 and 4.

For the appellant it was contended that the drains in the back-yards of the property in Back Pleasant Street had been in existence for many years, not simply as a drain for a few houses, but as a sewer receiving the sewage from the houses on both sides of Back Pleasant Street, and belonging to different

(1) The effect of the evidence called before the justices on both sides, so far as it is material for the purposes of this report, is sufficiently stated in the judgment.

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owners, and the inaction of the town authorities in years past prohibited the respondents from treating this sewer now as simply a private drain, and further that, as all sewers were now vested in the urban authority, it was the duty of the respondents to make any alterations in its construction or position at the public expense. Further, that the passive attitude of the respondents in past years was evidence that Back Pleasant Street was sewered to their satisfaction, and that the expense of constructing the new sewer must be borne by them.

After hearing this evidence the justices considered the question whether this drain was a sewer which had vested in, and become repairable by, the respondents, and decided in the negative.

The justices therefore disallowed the objections, and approved the proposals of the respondents and the provisional apportionments of the expenses.

The questions for the consideration of the Court were:—

1. Were the justices right in overruling the objection taken on behalf of the appellant, that the onus probandi was upon the respondents, to shew that Back Pleasant Street was a street, within the meaning of the Private Street Works Act, 1892, and that they had failed to do so?

2. Were the justices justified, upon the evidence, in holding that Back Pleasant Street is not a highway repairable by the inhabitants at large?

3. Were the justices justified, upon the evidence, in holding that Back Pleasant Street is a street not sewered to the satisfaction of the authority?

Dec. 10, 11. *Loehnis*, for the appellant. The points raised by the notices of objections, which are stated in the case, are sound, and the proposals of the urban authority as to the sewering of Back Pleasant Street, and the provisional apportionment of the expenses, ought to be quashed. The street in question was, and is, a highway repairable by the inhabitants at large, and therefore, by the express terms of s. 5 of the Private Street Works Act, 1892, it is not a "street," within the meaning of the Act, and the urban authority could have no

jurisdiction, under s. 6, to resolve to do the proposed private street works. Whether the street was a thoroughfare for horses and carts, or only for foot-passengers, in either case it was a highway. The proposed works are unreasonable. The street has already been sewered to the satisfaction of the urban authority. After having acquiesced in the existing state of things for so many years, the respondents are not now entitled to object to the sewering of the street.

*Temple Franks*, for the respondents. The decision of the justices was right. The street is a "street," within the meaning of the Act, and is not a highway repairable by the inhabitants at large. The decision of the justices is a decision upon questions of fact, and it cannot be reviewed or overruled by this Court. The justices ask whether they were justified, upon the evidence, in holding that the street was not a highway repairable by the inhabitants at large. That means, was there any evidence on which they could so hold, and, if there was any such evidence, however slight, their finding cannot be upset. There is distinct proof of one act of interruption of the use of the street as a thoroughfare (1), and that is sufficient to justify the finding. The proposed works are reasonable, and there is no evidence that the street was ever sewered to the satisfaction of the respondents. [The following authorities were referred to: *Rex* v. *Lloyd* (2); *Woodyer* v. *Hadden* (3); *Rex* v. *The Inhabitants of Northampton* (4); *Davies* v. *Stephens* (5); *Poole* v. *Huskinson* (6); *Illingworth* v. *Montgomery* (7); *Reg.* v. *Bradfield* (8); *Vernon* v. *Vestry of St. James, Westminster* (9); *Bonella* v. *Twickenham Local Board of Health* (10); *Walthamstow Local Board* v. *Staines* (11); *Fenwick* v. *Rural Sanitary Authority of Croydon Union* (12); *Handsworth Local Board* v. *Taylor* (13);

(1) A witness named Swire, who was called before the justices, and whose evidence was set out in the case, stated that on one occasion he saw the agent of some adjoining property prevent a man with a horse and cart from going down the street.

(2) (1808) 1 Camp. 260.

(3) (1813) 5 Taunt. 125.

(4) (1814) 2 M. & S. 262.

(5) (1836) 7 C. & P. 570.

(6) (1843) 11 M. & W. 827.

(7) (1859) 2 L. T. (N.S.) 726 24 J. P. 101.

(8) (1874) L. R. 9 Q. B. 552.

(9) (1880) 16 Ch. D. 449.

(10) (1887) 20 Q. B. D. 63.

(11) [1891] 2 Ch. 606.

(12) [1891] 2 Q. B. 216.

(13) (1893) [1897] 2 Ch. 442, n.

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*Barry and Cadoxton Local Board* v. *Parry* (1); *Bradford* v. *Mayor, &c., of Eastbourne* (2); *Reg.* v. *Mayor, &c., of Hastings* (3); *Handsworth District Council* v. *Derrington* (4); *Seal* v. *Merthyr Tydfil Urban District Council.* (5) ]

*Cur. adv. vult.*

Dec. 21. The following written judgment was delivered by

CHANNELL J. This was a case stated by magistrates under the Private Street Works Act, 1892. The appellant Rishton had duly objected to being charged with a proportion of the expenses of sewering a street called Back Pleasant Street in Haslingden, and the magistrates, having heard his objections, and decided against him, stated this case. The objections resolved themselves into two, namely—first, that Back Pleasant Street was a highway repairable by the inhabitants at large; secondly, that it had already been sewered to the satisfaction of the respondents.

The case states that Back Pleasant Street was formed between 1806 and 1816, and was then, and has remained always, open at both ends into old highways, and that the streets and buildings have existed in their present condition and position for seventy years at least, and there is an express admission that since its formation Back Pleasant Street had been used by foot-passengers without interruption. The case then sets out the evidence of witnesses both for the respondents and for the appellant, and the magistrates state certain reasons for coming to the conclusion that Back Pleasant Street was not a highway repairable by the public. They submit, as to this part of the case, two questions:—

1. Were we right in overruling the objection, taken on behalf of the appellant, that the onus probandi was upon the respondents to shew that Back Pleasant Street was a street, within the meaning of the Private Street Works Act, 1892, and that they had failed to do so?

(1) [1895] 2 Q. B. 110.
(2) [1896] 2 Q. B. 205.
(3) [1897] 1 Q. B. 46.
(4) [1897] 2 Ch. 438.
(5) [1897] 2 Q. B. 543.

2. Were we justified, upon the evidence, in holding that Back Pleasant Street is not a highway repairable by the inhabitants at large?

The first of these questions is not very important. The onus probandi clearly was on the respondents; but now that we have before us, not only the evidence of the respondents, but also that of the appellant, it becomes unnecessary to consider what would have been the effect of the respondents' evidence, if it stood alone, and whether or not it would have satisfied the onus. The second question is the one which must decide this part of the case. The magistrates ask, "Were we justified in finding?" It is contended that, as the magistrates can only atets a case upon a point of law, and must themselves decide a question of fact, this question means, "Was there any evidence upon which we could find as we did?" And this we think is so. If the whole matter were open to us, we should probably come to the conclusion that Back Pleasant Street was, and had been from the time of its formation, a highway, not only for foot-passengers, but also for carts and carriages. It is a very strong fact that it was from the first a thoroughfare open at both ends to old highways. The fact that no repairs have been done to it at the public expense is a matter of very small weight, having regard to the nature of the place, and the suggested repairs at private expense were only cleaning of refuse away, and other small matters. If it was a highway before 1835, it would be repairable by the inhabitants at large, without any formalities having been gone through to take it over. The whole question is, however, not open to us, and as there is, in the evidence of Thomas Swire, one case of a horse and cart being stopped, and as, upon the question of carriage-way, the fact that the public have not repaired is a much stronger piece of evidence than it is in reference to a footway, we think that we cannot hold that there was no evidence upon which the magistrates could find that this was not a public carriage-way. Upon the question whether it was a public footway, the admissions appear to us conclusive, and there is nothing whatever in the evidence set out inconsistent with this. The points urged before us by the counsel for the respondents as evidence justifying the

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Channell J.

finding of the magistrates, which we must assume to be, though they do not very distinctly state it, that there was (at least before 1835) no public footway, are, the absence of proof of public repairs, the suggested proof of private repairs, and the original construction of the passage in question. As to these, the construction appears to us to favour its being a public footway; the private repairs are not proved, even in the view of the magistrates; and the absence of public repairs is accounted for by the nature of the place. We think, therefore, that the case must be dealt with on the footing that this was prior to 1835 a public footway. It was urged that only one witness spoke to the time before 1835; but any difficulty on this point is quite got over by the admissions. This being so, and there having been no addition to the old footway, it seems to us that the place in question is not a "street," within the definition in the Private Street Works Act. It is not like the case where, there being an old footway, a new street has been formed by throwing into it more land. On this ground we think the appeal must be allowed, and it becomes unnecessary for us to decide the other question, whether the urban authority can now declare themselves not satisfied with the sewering of Back Pleasant Street, or whether the case comes within the doctrine of *Bonella* v. *Twickenham Local Board of Health* (1), and the subsequent cases following that case. It appears to us that it is in fact sewered, although very imperfectly and badly, and that, as there has been no change whatever in the street for seventy years, and the urban authority have been contented with it ever since they became an authority, they cannot say that they are dissatisfied with it. We think that the decision of Romer J. in *Handsworth Local Board* v. *Taylor* (2), which was quoted to us, applies only to a growing street, and that in the present case, if there had been new buildings fronting this street, the authority might have said that they had never been satisfied with the sewering of the street which it had become. They have, however, been satisfied with the sewering of the street which in fact it is. The necessity for the works now proposed has not arisen from any

(1) 20 Q. B. D. 63. (2) [1897] 2 Ch. 442, n.

change of things in the street in question, but from a new general system of sewering of the district having been recently adopted. The new sewer in this locality is really wanted for the houses in Pleasant Street and Hindle Street, and it would be a very remarkable result of the legislation, if the fact of there being a private back passage between these two streets enabled the local authority to do, at the private expense of the owners, work, which, if there were no such passage, would have to be done at the public expense.

If this view is correct the appeal should be allowed on this ground also, but we have not very fully considered it, and base our judgment upon the ground that the place in question is not a street, within the meaning of the Private Street Works Act, 1892, being a footway repairable by the public at large.

HAWKINS J. I entirely concur in this judgment.

*Appeal allowed.*

Solicitor for appellant: *T. H. Philpots, for Whitaker & Hibbert, Haslingden.*

Solicitors for respondents: *Harrison & Davies, for Musgrave.*

P. B. H.

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*Dec.* 6, 14.

## THE ROYAL COLLEGE OF MUSIC, APPELLANTS *v.* THE VESTRY OF SAINT MARGARET'S AND SAINT JOHN'S WESTMINSTER, RESPONDENTS.

*Local Government—Rates—Exemption—Society instituted for Purposes of the Fine Arts—Royal College of Music—Scientific Societies Act*, 1843 (6 & 7 *Vict. c.* 36), *s.* 1.

The Royal College of Music was created and incorporated by royal charter, for the advancement of the art of music by means of a teaching and examining body conferring degrees and certificates of proficiency, for the promotion and supervision of musical instruction conducive to the cultivation and dissemination of the art of music, and, generally, for the encouragement and promotion of the cultivation of music as an art. The college erected a building on land demised to them for a long term by a lease containing a stipulation that the building should be used for the purposes of the charter only, and it was so occupied and used. The college was supported in part by annual voluntary contributions. An amendment of the charter prohibited any dividend, gift, division, or bonus in money, to the members:—

*Held*, that the college was a society instituted for purposes of the fine arts exclusively, within the meaning of the Scientific Societies Act, 1843, s. 1, and therefore was entitled, under that section, to exemption from parochial rates in respect of the building.

CASE stated pursuant to 12 & 13 Vict. c. 45, s. 11.

The Royal College of Music was created and incorporated by royal charter, dated May 23, 1883, and is governed by and under this charter and two amendments thereof made in 1884 and 1896, and by regulations made under the charter. The college and its affairs are managed and carried on wholly in accordance with, and for the purposes of, the charter and amendments, and wholly in accordance with the regulations.

The charter recites that it is granted as Her Majesty was desirous of promoting the advancement of the art of music by the establishment of the college, and provides, after incorporating the college, as follows:—

"Purposes of Corporation.

"The purposes for which the corporation is founded are, first, the advancement of the art of music by means of a central teaching and examining body, charged with the duty of providing musical instruction of the highest class, and of rewarding

with academical degrees and certificates of proficiency and otherwise persons, whether educated or not at the college, who on examination may prove themselves worthy of such distinctions and evidences of attainment; and, secondly, the promotion and supervision of such musical instruction, in schools and elsewhere, as may be thought most conducive to the cultivation and dissemination of the art of music in the United Kingdom; and, lastly, generally, the encouragement and promotion of the cultivation of music as an art throughout our dominions.

"As to the Pupils.

"The pupils shall consist of scholars, exhibitioners, and students. The scholars and exhibitioners shall be pupils who have attained scholarships and exhibitions entitling them, wholly or partially, to the privileges of gratuitous education and maintenance, or one of such privileges, or to some description of aid in their education. The students shall be pupils who have obtained neither scholarships nor exhibitions."

By the amendment of 1896 it is provided:—

"The Royal College of Music shall not make any dividend, gift, division, or bonus in money, unto or between any of its members.

"No graduate of the Royal College of Music competing for, entitled to, or holding, a fellowship from, or in the gift of, the corporation, shall, while he is competing for, or entitled to, or holds, such fellowship, be a member of the corporation."

By the regulations it is provided:—

"The buildings of the Royal College of Music shall be used exclusively for the transaction of its business, and the carrying into effect the purposes of the charter, and the amendments thereof."

The building of the college is situate in Prince Consort Road, in the parish of Saint Margaret, and is built upon land demised to the college by indenture, dated December 30, 1891, by the Commissioners for the Exhibition of 1851, for 999 years from June 24, 1890, at a nominal annual rent amounting to 5*l*. The lease provides: that the college is to erect on the demised land buildings suitable for a college building for the purposes of the charter of the college; that during the term the college shall use the demised premises, and every part thereof, for

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the purposes of the royal charter by which the college is incorporated, and of any charter or charters thereafter granted by way of supplement thereto, or in substitution therefor, and for no other purpose whatever, and that the college shall not assign, underlet, or part with the possession of, the premises, or any part thereof, to any corporation or person whatever. The lease contains the usual powers of re-entry.

The building was duly built and completed out of funds provided by private munificence. This is the building which is the subject of the rates hereinafter mentioned.

The building rated is, and has been, occupied wholly and exclusively by the college, and solely for the transaction of its business, and for carrying into effect the purposes of the college, as limited by the charter, the amendments thereof, and its regulations. The college has carried out, and carries out, no purpose other than the "Purposes of the Corporation" defined in the charter.

The college is supported in part by annual voluntary contributions, receiving annual voluntary subscriptions from a number of individuals, and from the Commissioners for the Exhibition of 1851, and an annual subscription from Her Majesty out of an annual grant voluntarily voted to Her Majesty by Parliament, and available, by the terms of the vote, to Her Majesty for the purpose.

The following is the statement of the receipts of the college for the year ending April 30, 1896, as contained in the revenue account of the college for that year, namely:—

| | £ | s. | d. |
|---|---|---|---|
| To balance from April 30, 1895 . . | 149 | 7 | 11 |
| ,, Annual subscriptions . . . | 1,132 | 8 | 0 |
| ,, Dividends and interest . . . | 4,639 | 4 | 6 |
| ,, Fees from pupils and candidates . | 11,535 | 12 | 8 |
| ,, Government grant . . . | 500 | 0 | 0 |
| ,, The Associated Board of the Royal Academy of Music and the Royal College of Music for local examinations . . . . . | 800 | 0 | 0 |
| ,, Repayments by pupils, &c. . . | 23 | 12 | 8 |
| | 18,780 | 5 | 9 |

The item "Dividends and interest" includes sums received from investments of donations made to the college upon trust for scholarships, exhibitions, prizes, and maintenance of scholars. The fees from candidates are sums taken from candidates at certain of the college examinations for the purpose of going towards the expenses of such examinations. The fees from pupils are payments made by the college pupils (not entitled to free tuition) in respect of tuition; these fees are expended in meeting the expenses incurred in and with respect to the tuition and pupils, but the fees are insufficient to defray these expenses, and the teaching by the college is not carried on at a profit, or with the view to making a profit over and above the expenses. The college does not train either teachers, or professional musicians, or singers, as such, having no course of instruction arranged with that view, but teaches the science and art of music in all its branches to all its pupils alike, and imparting the same courses of musical instruction to all. Without the annual voluntary contributions, the donations, and the dividends and interest from invested funds, the college cannot meet its expenses.

The college has not made, and does not make, any dividend, gift, division, or bonus in money, unto or between any of its members.

On April 10, 1897, the respondent vestry made two separate rates, one being a poor's rate, and the other included a general rate (including school board rate), and a rate purporting to be called a sewers rate.

The building occupied by the college for the purposes aforesaid was assessed to the said rates.

The question for the opinion of the Court was:—

Is the Royal College of Music exempt from being assessed or rated, and from liability to payment to county, borough, parochial, and other local rates and cesses, in respect of the said land and building, pursuant to 6 & 7 Vict. c. 36? (1)

Dec. 6. *Danckwerts*, for the appellants. It cannot be denied that music is one of the fine arts, and the statements

(1) The material provisions of this statute are set out in the judgment.

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in the special case, as to the object and terms of the charter, and the purposes of corporation, and as to the terms of the amendment of 1896, and of the regulations, and of the lease, and as to the objects for which the building is used, shew conclusively that this is a building belonging to a society instituted for the purposes of the fine arts exclusively, within the meaning of s. 1 of the Scientific Societies Act, 1843. The case shews that the building is occupied for the transaction of the business of the society, and is supported in part by annual voluntary contributions, and that no dividend, gift, division, or bonus in money, can be made to the members. It follows that the college comes within the exemption. The respondents may rely upon *Reg.* v. *Institution of Civil Engineers* (1), but that case is inconsistent with the subsequent decision of the House of Lords in *Commissioners of Inland Revenue* v. *Forrest* (2), and must be taken to be overruled.

*R. Cunningham Glen*, for the respondents. The college does not come within the exemption. The statements in the special case shew that its main and primary object is, not so much the cultivation and diffusion of musical knowledge, as the education of pupils and candidates, so as to put them in a position to be able to earn a livelihood as teachers of music. The authorities shew that where this is the case the exemption does not apply. *Reg.* v. *Institution of Civil Engineers* (1) has not been overruled, and the principle of that decision is applicable to the present case.

*Danckwerts*, in reply. The advancement of the art of music cannot be promoted better than by teaching music.

[In addition to the above decisions the following were referred to: *Reg.* v. *Pocock* (3); *Reg.* v. *Manchester Overseers* (4); *Reg.* v. *Brandt* (5); *Scott* v. *St. Martin's in the Fields Overseers* (6); *Overseers of the Savoy* v. *Art Union of London* (7); *Mayor of Manchester* v. *McAdam.* (8)

*Cur. adv. vult.*

(1) (1879) 5 Q. B. D. 48.
(2) (1890) 15 App. Cas. 334.
(3) (1846) 8 Q. B. 729.
(4) (1851) 16 Q. B. 449.
(5) (1851) 16 Q. B. 462.
(6) (1855) 5 E. & B. 558.
(7) [1896] A. C. 296.
(8) [1896] A. C. 500.

Dec. 14. The following written judgment was delivered by

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HAWKINS J. The question raised for our opinion is, whether the Royal College of Music is exempt from being assessed or rated to the parochial rates of the respondent parishes made on April 10, 1897 (within which parishes the buildings of the college are situated) by reason of the exemption contained in the statute 6 & 7 Vict. c. 36, s. 1. By that statute, after reciting that "it is expedient that societies established exclusively for purposes of science, literature, or the fine arts, should be exempt from the charge of county, borough, parochial, and other local rates, in respect of land and buildings occupied by them for the transaction of their business, and for carrying into effect their purposes," enacts "that, from and after the 1st day of October, 1843, no person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay, to any county, borough, parochial, or other local rates, or cesses, in respect of any land, houses, or buildings . . . . belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, . . . . and occupied by it for the transaction of its business, and for carrying into effect its purposes; provided that such society shall be supported, wholly or in part, by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money, unto or between any of its members."

The Royal College of Music was constituted a body corporate by letters patent on May 23, 1883. The charter recites "that it is expedient that a Royal College of Music should be formed on a more permanent and extended basis than any existing musical institution." It then goes on to state that Her Majesty the Queen, being desirous of promoting the advancement of the art of music by the establishment of the said college, by that charter constituted a body corporate by the name of the Royal College of Music, with power to acquire and hold lands for the purposes of the corporation, which were described to be, "first, the advancement of the art of music, by means of a central teaching and examining body charged with the duty of providing musical instruction of the highest class, and of rewarding with academical degrees, and certificates of proficiency, and otherwise,

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persons, whether educated or not at the college, who on examination may prove themselves worthy of such distinctions and evidences of attainment; and, secondly, the promotion and supervision, of such musical instruction, in schools and elsewhere, as may be thought most conducive to the cultivation and dissemination of the art of music in the United Kingdom; and lastly, generally, the encouragement and promotion of the cultivation of music as an art throughout our dominions." Such are the declared purposes of the corporation. It is difficult to imagine an institution more exclusively devoted to any of the fine arts than is the Royal College of Music. With a view to providing a building for the transaction of the business, and carrying into effect the objects and purposes mentioned in the charter, the Commissioners for the Exhibition of 1851, in December, 1891, demised to the corporation for a very long term, at a nominal rent, the plot of land on which the college now stands. In the lease there is an express stipulation that such building should be so erected by the college, and during the term such building, and every part thereof, should be used for the purposes of the charter, and for no other purpose whatsoever, and there is a further provision that the college shall not assign, or underlet, or part with the possession of, the premises, or any part thereof. In due course the building, the subject of the rates in question, was erected out of funds provided by private munificence. The case expressly finds that such building has been occupied wholly and exclusively by the Royal College of Music solely for the transaction of its business, and for carrying into effect the aforesaid purposes of the college, and that the college has carried out no purpose other than the purposes of the corporation, as defined in the charter. What more is required to entitle the building to the exemption given by the statute? This exemption is subject, however, to the proviso at the end of the 1st section already set forth. I am at a loss to understand upon what ground it can fairly be contended that the first requirement of the proviso, namely, that the corporate society shall be supported wholly or in part by annual voluntary contributions, has not been fulfilled. The case expressly finds that it has. It is true that, of the

18,780*l.* received in the year ending April, 1896, the sum of 1632*l.* only was derived from annual subscriptions of a purely voluntary character; but that is a substantial sum, and, in my opinion, is quite sufficient to satisfy the requirements of the proviso, that the support shall be partly by voluntary subscriptions. The case cited of *Overseers of the Savoy* v. *Art Union of London* (1) does not affect this case. It can hardly be said that the interest and dividends, 4639*l.*, were annual voluntary contributions, for they were interest and dividends of moneys or securities already belonging to the society. Such invested moneys were, however, in part made up of donations made to the college upon trust for scholarships, exhibitions, prizes, and maintenance of scholars. The second requirement of the proviso seems to have been overlooked when the original charter was prepared. This defect, however, was remedied by a special resolution, duly passed on February 24, 1896, that "The Royal College of Music shall not make any dividend, gift, division, or bonus in money, unto or between any of its members."

The ground upon which it was contended by the respondents that the college is not entitled to the exemption is very similar to that upon which the exemption from rateability was resisted when claimed by the Institution of Civil Engineers, first under 6 & 7 Vict. c. 36, and on another occasion, when exemption from liability to the duty imposed under s. 11 of the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), was claimed. The first of these cases, that of *Reg.* v. *Institution of Civil Engineers* (2), in which the defendants claimed exemption from parochial rates, was determined by Field and Manisty JJ. against the institution, substantially upon the ground that, as a matter of fact, the primary object of the institution was not for the purpose or promotion of science exclusively, but for the acquisition of scientific knowledge, for the purposes, and in the interests, of the members of the institution.

The next case, *In the Matter of Duty on the Estate of the Institution of Civil Engineers* (3), a claim of exemption from

(1) [1896] A. C. 296. (2) 5 Q. B. D. 48.
(3) (1887) 19 Q. B. D. 610.

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duty imposed by the Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 11, sub-s. 3, was decided by Lord Coleridge and Field J. in a Divisional Court against the institution, upon substantially the same ground. That decision was, however, reversed on appeal by Lord Esher M.R. and Fry L.J. (Lopes L.J. dissenting) (1), on the ground that, upon the true construction of the charter, its object was the promotion of mechanical science by the activity of the body of civil engineers, and therefore the main object to which the funds of the institution were appropriated was the promotion of science, and the fund was so appropriated in fact. (2) This judgment of the Court of Appeal was affirmed in the House of Lords by Lords Watson and Macnaghten (Lord Halsbury L.C. dissenting), in *Commissioners of Inland Revenue* v. *Forrest* (3) (the secretary of the institution). In delivering his judgment Lord Macnaghten put the case thus (4): "The question at issue may be stated shortly. Is the property of the Institution of Civil Engineers legally appropriated and applied for the promotion of the science of civil engineering, or is it legally appropriated and applied for the benefit of civil engineers, in order to enable them to practise their profession to greater advantage? It cannot, I think, be doubted that the institution has raised the standard of the profession, and that to a civil engineer it is of advantage, and probably of pecuniary advantage, to be a member. But is that result the purpose of the society, or is it an incidental, though an important, and perhaps a necessary, consequence of the way in which the institution does its work in the pursuit of science?"

In further elucidation of this view, a passage from the judgment of Field J. in *Reg.* v. *Institution of Civil Engineers* (5) may well be cited. It is as follows: "It may be perhaps that the discussion of science in any shape is productive of advantage to the individuals who compose the institution; but if the advantage and acquisition of science taken generally is the main and substantial object of the association, then the neces-

(1) (1888) 20 Q. B. D. 621.
(2) 20 Q. B. D. at pp. 629, 630, per Fry L.J.
(3) 15 App. Cas. 334.
(4) 15 App. Cas. at p. 354.
(5) 5 Q. B. D. 48, at pp. 52, 53.

sary concomitant of advantage and enjoyment to the individual does not destroy the exemption." The effect of the judgment in *Commissioners of Inland Revenue* v. *Forrest* (1) is virtually to overrule the first of these cases. (2)

Assuming the objects of the charter, as described in the charter itself, to be fully carried out, could it be seriously doubted that the society was instituted for the purposes of the high art of music exclusively? What is there in the charter which militates against that view? The building was, and is, absolutely necessary for the transaction of the business of the institution, and for the accommodation of the teachers and the pupils. Without such tuition as is provided for in the charter, it would be impossible to accomplish the objects of it. The fees received from pupils and candidates are reasonably received from those who can afford to pay them, but they are all applied exclusively to the declared purposes of the college. For those who are poor and unable to pay necessary maintenance is provided. The larger the number of apt pupils, whether rich or poor, receiving tuition at the college, the more will musical high art be disseminated throughout the Empire; the more encouragement to those who strive to acquire distinction in such art, the greater the prospect of the advancement of it. The building, and the funds, whether derived partly or entirely from voluntary subscriptions, are entirely and wholly applied to the objects of the charter, without any surplus profit to the corporation, and no member of the college derives any benefit from such funds. It may be that many of the pupils and scholars may, by means of the instruction afforded them, become so proficient in the art of music that they may be eminently fitted for, and devote themselves to, the profession of teachers of music as the means of competent livelihood. The more who do so, the more extensively and effectively will the art of music be promoted. This, however, will only be a fortunate result of the goodness of the tuition afforded, but not a result which it was the purpose of the society, or part of its business, to bring about; it would only be an incidental advantage to both the pupil and the institution.

(1) 15 App. Cas. 334. (2) *Reg.* v. *Institution of Civil Engineers*, 5 Q. B. D. 48.

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I have not thought it necessary or useful to discuss all the other authorities and dicta cited, for I do not think they have much bearing on this particular case.

Having found nothing which in my opinion is hostile to the exemption claimed, I think the appellants are entitled to have it allowed. There will therefore be judgment for the appellants with costs.

CHANNELL J. I entirely agree with the judgment which has been delivered.

*Judgment for the appellants.*

Solicitor for appellants: *H. T. Boodle.*
Solicitor for respondents: *Gates.*

P. B. H.

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*Dec.* 15.

## CLIFFORD *v.* THAMES IRONWORKS AND SHIP-BUILDING COMPANY.

*Practice—County Court—Non-direction—Appeal — County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.

The rule that no appeal lies from a county court except upon a point of law taken at the trial applies to the case of an omission by the judge in his summing-up to give the jury proper and necessary directions as to the law. The party desirous of appealing on the ground of such non-direction must take the objection at the time so as to give the judge an opportunity of correcting his direction.

APPEAL from the Bow County Court in an action tried by a jury.

The plaintiff was a workman in the service of the defendants, and the action was for personal injuries caused by the negligence of the defendants in providing him with a defective tool. Verdict and judgment were entered for the plaintiff.

*Jelf, Q.C.*, and *Colam*, for the defendants, moved for a new trial on the ground of misdirection. The grounds of the alleged misdirection stated in the notice of appeal were "that the judge misdirected the jury by omitting to direct them as

to the law of negligence and contributory negligence, and by omitting to tell them that if the plaintiff was the author of his own wrong or voluntarily incurred the risk he could not recover."

*E. Morten*, for the plaintiff. There is a preliminary objection to the hearing of the application on the ground that no objection was taken to the alleged misdirection at the time. In *Smith* v. *Baker* (1) it was decided that the effect of s. 120 of the County Courts Act, 1888, is to preclude any appeal, except upon a question of law, raised and submitted to the judge at the trial.

*Jelf, Q.C.*, in reply. The principle of *Smith* v. *Baker* (1) has no application to the case of a question of law arising for the first time in the course of the judge's summing-up to the jury. It would not be respectful to interrupt his summing-up, and there would be a practical difficulty in the way of taking the objection after the summing-up was closed.

GRANTHAM J. I entertain no doubt that this objection is fatal. No exception was taken to the judge's direction at the trial. But it is a condition precedent to a right to complain of misdirection that exception should have been taken to it at the time. It is said that counsel cannot interrupt the judge in the course of his summing-up, and it would shew a want of respect to the Court to do so. I cannot agree. It is frequently done; and for my own part I may say that I am only too glad to be interrupted if I am going wrong, either in omitting to direct the jury sufficiently or in misdirecting them. I can see no objection whatever to drawing the judge's attention to a misdirection at the time. The appeal must be dismissed.

CHANNELL J. I think we have no jurisdiction to hear this appeal. The objection to the direction complained of should be taken at the trial wherever it is possible to do so. Here it was quite possible. The misdirection complained of in the notice of appeal is in the nature of non-direction, and the county court judge could without either inconvenience or

(1) [1891] A. C. 325.

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disrespect have been asked at the end of his summing-up to direct the jury in the way it is now contended that he should have directed them.

*Appeal dismissed.*

Solicitors for plaintiff: *Shaen, Roscoe & Massey.*
Solicitors for defendants: *Watson, Sons & Room.*

J. F. C.

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*Jan.* 17.

## GAYFORD *v.* CHOULER.

*Criminal Law—Malicious Injuries to Property Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 52—*Trespass on Grass Field—Actual Damage.*

The appellant, a trespasser, walked across a grass field of the respondent. The grass was long, and the appellant did damage to the grass to the value of 6*d.*:—

*Held*, that he was liable to be summarily convicted under s. 52 of the Malicious Injuries to Property Act, 1861, which makes it an offence to "wilfully or maliciously commit any damage injury or spoil to or upon any real or personal property whatsoever . . . . for which no punishment is hereinbefore provided."

CASE stated by justices for the county of Nottingham.

The respondent was the tenant of a farm at Chilwell. On July 12, 1897, the appellant and two other men, who had been walking along a public footpath, left the footpath at a point where it adjoined the respondent's land, and walked across a grass field of the respondent for a distance of 130 yards to another public footpath. There was no right of way across the field, and at the point where the appellant entered the field there was a notice board with the words "No road." The respondent told the appellant and the other men that they had no right to go there, but they persisted in going on. They walked abreast through the grass, which was knee-deep, thereby doing damage to the grass. The damage done by the appellant alone was to the value of 6*d.* The respondent then laid an information against the appellant under s. 52 (1) of the Malicious

(1) By s. 52 of the Malicious Injuries to Property Act, 1861, "Whosoever shall wilfully or maliciously commit any damage injury or spoil to or upon any real or personal property whatsoever, either of a public or

Injuries to Property Act, 1861, for that he "did unlawfully wilfully and maliciously damage certain grass to the amount of sixpence the property of the respondent and then and there growing in a certain field in his occupation." At the hearing it was contended on behalf of the appellant that the alleged trespass was not an offence within s. 52, and that the respondent's only remedy was a civil action. The justices, however, being of opinion that the trespass was a wilful and malicious act, and finding as a fact that actual damage had resulted therefrom, convicted the appellant, subject to a case for the opinion of the Court.

*W. H. Stevenson*, for the appellant. The case of *Gardner* v. *Mansbridge* (1) is a direct authority that this conviction cannot be sustained. The Court (A. L. Smith and Wills JJ.) there laid it down, in a considered judgment, that "to constitute an offence within s. 52 for committing damage, injury, or spoil, to real property, proof must be forthcoming of actual positive damage . . . . to the realty itself, and if . . . . proof of damage is confined only to damage to the product growing upon the realty and consequent loss to the owner of such product no offence is established within s. 52 of the Act." They accordingly held that the picking of mushrooms was not a damage to the realty within the meaning of s. 52. No distinction can be drawn between that case and the present. Grass is as much a product growing upon the realty (as distinguished from the realty itself) as are mushrooms.

No counsel appeared for the respondent.

DAY J. I am of opinion that this conviction was right. The justices found as a fact that actual damage was done to the grass by the appellant, and they also found, and in my opinion rightly, that his act was wilful and malicious. The grass was

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private nature, for which no punishment is hereinbefore provided," shall on conviction thereof be imprisoned, with or without hard labour, or forfeit a sum not exceeding 5*l.*, and also such further sum not exceeding 5*l.* as shall appear to be a reasonable compensation for the damage committed.

(1) (1887) 19 Q. B. D. 217.

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deep, and it was inevitable that if a person walked across it some damage would be done. Yet the appellant persisted in walking across it. A man must be taken to intend the natural consequences of his act.

LAWRANCE J. I agree.

Solicitor for appellant: *P. Woodward, Nottingham.*

J. F. C.

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*Dec.* 13.

## ATTORNEY-GENERAL *v.* EARL GREY.

*Revenue—Estate Duty—Settlement—Reservation of Interest to Settlor—Extent of Liability to Duty on Death of Settlor—Conditional Power of Revocation of Settlement—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*) *—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*a*), (*c*)—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 11.

By a deed made in 1885 the owner of certain estates gave them to his nephew in fee subject to the reservation of an annual rent-charge payable to the donor and expressed to be issuing out of the estates so given. The deed also provided that in certain events the donor should be at liberty to revoke the deed.

The annual income of the estates was considerably in excess of the rent-charge. After the commencement of Part I. of the Finance Act, 1894, and before the happening of any of the events upon which the power of revocation was exercisable, the donor died:—

*Held*, (1.) That the whole of the estates were "property passing under a . . . . settlement . . . . whereby an interest in such property for life . . . . (was) reserved . . . . to the settlor" within the meaning of s. 38, sub-s. 2 (*c*), of the Customs and Inland Revenue Act, 1881, and that estate duty was payable under the Finance Act, 1894, upon the principal value of the whole.

(2.) That the donor of the estates had by the deed "reserved to himself the right . . . . to restore to himself . . . . the absolute interest in such property" within the meaning of the same sub-section none the less because the conditions upon which the right was exercisable had not happened.

INFORMATION by the Attorney-General claiming estate duty under the Finance Act, 1894.

By a deed dated October 19, 1885, and made between Henry, third Earl Grey (since deceased), of the one part, and the defendant, then Albert H. G. Grey, of the other part, reciting that

the said Henry, Earl Grey, was possessed of considerable estates, a portion of which was subject to certain life annuities, and another portion of which was subject to a mortgage, and that he was also possessed of considerable personal estate, including the furniture and effects in the said Earl's mansion-house at Howick, and that the defendant was the nephew of the said Earl Grey and heir-presumptive to the peerage, and that the said Earl Grey was desirous of giving his real and personal estate to the defendant subject to the provisions therein contained: It was witnessed that the said Earl Grey did convey to the defendant (subject to the said life annuities and mortgage) all his real estate other than the mansion-house and the appurtenances, to the use that the said Earl Grey should thenceforth during his life receive an annual rent-charge of 4000*l.* to be issuing out of the said hereditaments, and subject thereto to the use of the defendant in fee simple. And it was also witnessed that the said Earl Grey assigned to the defendant all the furniture and effects in and about the said mansion-house and all other his personal estate (except his private papers and effects in his own personal use), to hold the same subject to the trusts and provisions thereinafter contained to the defendant absolutely for his own use and benefit. And it was declared that the mansion-house, with the gardens, outbuildings, and appurtenances, together with the furniture, plate, articles of household use, carriages and horses, and other things in and about the mansion-house, should be held in trust to permit the said Earl Grey to occupy and use the same respectively during his life. And the defendant covenanted with the said Earl that he, the defendant, his heirs, executors, administrators or assigns would (1.) pay the said life annuities; (2.) pay the said mortgage debt with the interest thereon; (3.) pay to the said Earl Grey the said annual rent-charge of 4000*l.*; (4.) at their own cost keep the mansion-house insured and repaired and stock and manage the gardens; (5.) supply to the said Earl Grey (free of cost to him) all such farm and garden produce as he might require for consumption at the mansion-house; (6.) pay the funeral and testamentary expenses of the said Earl, and also all his debts to the full exhaustion of all his

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real and personal property; (7.) that the lands at or near Howick, then farmed by the said Earl, should not be sold or let during his life, but should be farmed personally by the defendant, and that no buildings should be erected thereon without the said Earl's consent; (8.) that they would at the request of the said Earl, his executors or administrators, produce all receipts and vouchers for payments to be made under heads 1, 2, 4, and 6. And it was provided that in the event of the defendant dying in the lifetime of the said Earl, or of any breach by the defendant, his heirs, executors or administrators of any covenant therein contained, it should be lawful for the said Earl to revoke the deed now in statement either wholly or in part.

By an indenture dated September 26, 1894, and made between Henry, third Earl Grey, of the one part, and the defendant of the other part, it was witnessed that, in consideration of the sum of 5000*l.* paid to the said Earl by the defendant, the said Earl as beneficial owner conveyed and released to the defendant the rent-charge of 4000*l.* to the intent that the lands charged therewith might be discharged from the same, and released to the defendant all the premises conveyed by the indenture of October 19, 1885, from the power of revocation contained therein, and also released the defendant from the covenant to pay the rent-charge, and from the covenant to retain unsold and to farm certain lands near Howick.

The said third Earl Grey died on October 9, 1894; and thereupon the defendant succeeded to the Earldom. The average net annual income of the property comprised in the deed of October 19, 1885, after deducting interest on incumbrances and other charges and the cost of management, is, and was before as well as after the date of the last-mentioned indenture, considerably in excess of 4000*l.*

Under the circumstances the Crown claimed that estate duty under the Finance Act, 1894, became due on the principal value (less the value of the incumbrances subsisting thereon) of the whole of the property comprised in the deed of October 19, 1885, as being property passing on the death of the third Earl Grey within the meaning of ss. 1 and 2, sub-s. 1 (*c*), of the

Finance Act, 1894, which incorporates the provisions of s. 38 of 44 & 45 Vict. c. 12 as amended by s. 11, sub-s. 1, of 52 & 53 Vict. c. 7.

*Sir R. E. Webster, A.-G., Sir R. B. Finlay, S.-G.*, and *Vaughan Hawkins*, for the Crown. Amongst the classes of property passing on the death of a deceased, and upon which estate duty is now payable, is included property which would have been liable to account duty under the Customs and Inland Revenue Acts, 1881 and 1889. (1) The effect of s. 38, sub-s. 2, of the Act of 1881 as amended by s. 11 of the Act of 1889 and

(1) By the Finance Act, 1894, s. 2, sub-s. 1, "Property passing on the death of the deceased shall be deemed to include" . . . .

"(*c*) Property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom."

By the Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2, "The personal or moveable property to be included in an account shall be property of the following descriptions, viz.:—

"(*a*) Any property taken as a donatio mortis causâ made by any person dying on or after June 1, 1881, or taken under a voluntary disposition made by any person so dying, purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bonâ fide made three months before the death of the deceased."

"(*c*) Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property."

By the Customs and Inland Revenue Act, 1889, s. 11, sub-s. 1, "Sub-s. 2 of s. 38 of the Customs and Inland Revenue Act, 1881, is hereby amended as follows:

"The description of property marked (*a*) shall be read as if the word 'twelve' were substituted for the word 'three' therein, and the said description of property shall include property taken under any gift, whenever made, of which property bonâ fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

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by s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, is, so far as is material to the present case, as follows:—

Property passing on the death includes,

(*a*) Any real or personal property taken under a disposition by a person dying on or after August 1, 1894, purporting to operate as an immediate gift inter vivos, unless the donee assumed immediate possession and thenceforward retained it to the entire exclusion of the donor, or of any benefit to him by contract or otherwise, and the donor survived the gift by twelve months.

(*c*) Any real or personal property passing under a settlement made by a person dying on or after that date by deed or any other instrument, not taking effect as a will, whereby an interest in such property for life, or any other period determinable by reference to death, was reserved to the settlor, or whereby the settlor reserved to himself the right by the exercise of any power to restore to himself the absolute interest in such property.

The whole subject-matter of the deed of October 19, 1885, is liable to estate duty. It is so liable under (*a*) on the ground that the gift of the property was not made to the entire exclusion of the donor or of any benefit to him. The facts of the present case are almost identical with those in *Attorney-General* v. *Worrall.* (1) It is also liable under (*c*), both on the ground that there was an interest in such property reserved to the settlor for life, and on the ground that he had reserved to himself a power of revocation. The fact that the rent-charge reserved was less than the net annual income of the whole property is immaterial: it was expressed to issue out of the whole of the estates. If the parties wished to escape liability to duty in respect of the surplus income, they should have charged the rent-charge on a specific portion of the estates only.

*Cozens-Hardy, Q.C.*, and *Bremner*, for the defendant. The defendant is precluded by the decision in *Attorney-General* v. *Beech* (2) from contending that by the deed of release of September 26, 1894, the rent-charge was merged in the fee and

(1) [1895] 1 Q. B. 99. (2) [1897] 2 Q. B. 535.

that he is not liable to pay estate duty on the value of the rent-charge. It is admitted that he is liable to that extent, but it is contended that he is not liable to pay duty on the surplus value of the property. It is the object of these Acts to tax property passing under a disposition inter vivos only to the extent of the benefit or interest reserved. For if it were otherwise, then, inasmuch as it has been decided in *Attorney-General* v. *Worrall* (1) that to bring a case within (*a*) it is not necessary that the benefit reserved to the donor should be reserved out of the subject-matter of the gift, it would follow that if a father surrendered to his son an estate of the value of many thousands a year, but at the same time stipulated for some trifling concession in return, although such concession had no connection with the property surrendered, upon the father's death estate duty would be payable on the whole value of the property. In *Attorney-General* v. *Worrall* (1) this question did not arise. There a father, a mortgagee, assigned to his son a mortgage debt of 23,924*l.* in consideration of the son paying him an annuity for life of 735*l.*; and it was held on the father's death that account duty was payable on the whole value of the mortgage debt. But there the annuity represented the full value of the income of the mortgage debt. That case decides no more than that to the extent of the reservation the property is within the Act. Nor is the surplus income over and above the value of the rent-chage taxable under (*c*). The words "whereby an interest in such property . . . . is reserved . . . . to the settlor" must be understood to mean that the property is to be deemed to pass to the extent of such interest irrespective of the extent of the property in which the interest is reserved. The gift of a large estate reserving to the donor a 40*s.* rent-charge for the purpose of giving him a vote could not make the whole estate taxable. In s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, "property in which the deceased or any other person had an interest ceasing on the death of the deceased" is to be deemed to pass on the death of the deceased only "to the extent to which a benefit accrues or arises by the cesser of such interest." And it is improbable that the Legislature intended in another

(1) [1895] 1 Q. B. 99.

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part of the same sub-section to introduce a much more burdensome scheme of taxation. Nor does the case come within the provision in (*c*) as to the reservation of a right of restoration. For the power of revocation conferred by the deed of 1885 was conditional: it was exercisable only upon certain contingencies happening, and before those contingencies happened the donor died.

*Sir R. E. Webster, A.-G.*, was not called upon to reply.

GRANTHAM J. I am of opinion that the whole of the property comprised in the deed of October 19, 1885, passed upon the death of the third Earl Grey within the meaning of s. 2, sub-s. 1 (*c*), of the Finance Act, 1894. It may be that the Act operates hardly in the present case; but we have only to construe the language of that Act, and of the Acts to which it refers, as we find it. It is clear that the object of the Finance Act and of the Customs and Inland Revenue Acts, 1881 and 1889, was to spread the net as wide as possible for the purpose of preventing persons from evading taxation by purporting to dispose of their property inter vivos. I think in the first place that the property in question falls under s. 38, sub-s. 2 (*a*), of the Customs and Inland Revenue Act, 1881, as amended by the Act of 1889, as being the subject of a gift not made to the entire exclusion of the donor, or of any benefit to him by contract or otherwise. It seems to me that the transfer of the property by the Earl to his nephew was more for the benefit of the donor than of the donee, for not only had the nephew to pay his uncle a very considerable annual sum and supply him with such farm and garden produce as he required, but he also relieved him of the burden of the management of a great estate. Secondly, the property seems to come within clause (*c*) of the same sub-section, and in two respects: by the deed under which the property passed the Earl reserved to himself "an interest in such property for life" in the shape of a rent-charge of 4000*l.* a year, and, further, he reserved to himself the right in certain events to restore to himself the absolute interest in such property. It has been argued that the power of restoration referred to in clause (*c*) is a general power exercisable at all

events and untrammelled by any conditions. But with that I cannot agree. In my judgment any power of restoration is sufficient; for although conditional it would even before the contingency arose have the effect of preventing the donee from dealing with the property in the way in which any absolute owner could deal with it.

CHANNELL J. I am of the same opinion. On the question whether this was property passing under a settlement "whereby an interest in such property for life" was reserved to the settlor within the meaning of s. 38, sub-s. 2 (*c*), of the Act of 1881, it was argued for the defendant that, as the interest reserved was limited to 4000*l.* a year, the property was only taxable to that extent. But it is to be observed that the words are "an interest in such property." Any interest however small will do, provided it issues out of such property—that is, out of the property sought to be taxed. I agree that if several parcels of land be given by one and the same deed of gift, and an interest be reserved to the donor out of one of those parcels only, estate duty would not be payable upon the whole subject-matter of the gift, but only out of that specific portion in which the interest is expressed to be reserved. But that is not the case here. The rent-charge of 4000*l.* is expressed to be issuing out of the whole of the hereditaments passing under the deed. Further, I think that there was a power of revocation reserved as to the entirety of the property. Although the power of revocation was conditional upon certain events happening, it was not the less a right in the settlor to restore to himself the absolute interest in the property within the meaning of the Act. On both these grounds I think that the property was chargeable to estate duty to the full principal value.

*Judgment for the Crown.*

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Flux & Leadbitter.*

J. F. C.

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## WATSON (SURVEYOR OF TAXES) *v.* SANDIE & HULL.

*Revenue—Income Tax—Exercising Trade in United Kingdom—Foreign Principal—Consignment of Goods from Abroad to Agent here for Sale—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34)—*Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35).

Foreign principals were in the habit of consigning goods to agents in this country for sale. The agents, who invoiced the goods to their purchasers in their own names and guaranteed payment by the purchasers, remitted to their principals the proceeds of the sales less their charges and commission. On a claim by the Crown against the foreign principals for income tax:—

*Held*, that though there might be a presumption as between the agents and their purchasers that the agents and not the foreign principals were the vendors, there was no corresponding presumption as between the foreign principals and the agents that the property in the goods had passed from the principals to the agents; that the sales by the agents in this country were as between them and their principals made on behalf of the principals, and that the principals were consequently liable to income tax as exercising a trade within the United Kingdom within the meaning of s. 2, Sched. D, of the Income Tax Act, 1853.

CASE stated by Commissioners of Income Tax.

Messrs. Sandie & Hull appealed against two assessments, namely, 500*l.* for the year ended April 5, 1895, and 1000*l.* for the year ended April 5, 1896, both assessments having been made on them as estimates of the annual profits alleged to have arisen from a trade exercised within the United Kingdom by the firm of Squire & Co. of Boston, U.S.A., packers and provision merchants, under the following circumstances:—

Squire & Co. are packers—that is to say, they own or purchase live stock which they convert into provisions in Boston, U.S.A. These provisions are chiefly consumed in the United States, but the surplus is exported by Squire & Co. to this and other countries.

Sandie & Hull are commission merchants, carrying on business in Liverpool, and among the firms making consignments to them is that of Squire & Co., who at irregular intervals and in varying quantities make consignments to them for sale on

commission of lard and bacon, being part of the surplus provisions exported by Squire & Co. as aforesaid. Sandie & Hull do not receive any remuneration beyond the usual charges and commission. There is no agreement between them, and Squire & Co. may at any time without notice discontinue their consignments; but the mode of conducting the consignments that are made is that Squire & Co. with each consignment send forward documents comprising consignment notes, shewing in detail the amount drawn against each lot of goods making up the consignment. Bills of lading with the draft attached are sent forward through a bank by the same mail. Sandie & Hull take up the draft and realize the goods. Sometimes the draft exceeds the prices realized, and sometimes the prices realized exceed the draft. The risk of profit or loss on the transactions rests with Squire & Co. Sandie & Hull have full discretion as to the prices at which the goods are sold: they invoice the goods in their own name, receive the proceeds of sale, assume all responsibility of payment by the purchasers, and from time to time render statements to Squire & Co. shewing full receipts, and debiting the account with their charges and commission, and remitting to or drawing upon Squire & Co. for the credit or debit balance as the case may be.

Under these circumstances Sandie & Hull contended—

1st. That Squire & Co. were not persons exercising a trade within the United Kingdom either within the terms of Sched. D, 16 & 17 Vict. c. 34 alone, or read with s. 41 of 5 & 6 Vict. c. 35.

2nd. That they were not agents of Squire & Co. within the terms of s. 41 of 5 & 6 Vict. c. 35, and that if they were agents it was impossible for them to ascertain what profit, if any, Squire & Co. might make in respect of those portions of the goods manufactured by them which were consigned to this country, and that they could not, therefore, as agents make any deduction in respect of income tax.

The commissioners allowed the appeal, subject to a case for the opinion of the Court.

The questions for the opinion of the Court are:—

1. Whether Squire & Co. exercise a trade within the United Kingdom?

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2. Whether Sandie & Hull are the agents of Squire & Co. within the meaning of s. 41 of 5 & 6 Vict. c. 35.

3. Whether Sandie & Hull as such agents are liable to be assessed in respect of the said trade.

*Sir R. E. Webster, A.-G.*, and *Danckwerts*, for the Crown. Messrs. Squire & Co. exercised a trade within the United Kingdom within the meaning of s. 2, Sched. D, of the Income Tax Act, 1853. The contracts for the sale of the goods by their agents, Sandie & Co., are made in this country. The fact that a foreign principal employs an agent here to solicit orders for contracts to be made abroad does not constitute an exercise of a trade here by the foreign principal: *Grainger* v. *Gough*. (1) But it is otherwise where the agent makes the contracts here: *Tischler* v. *Apthorpe* (2); *Pommery* v. *Apthorpe* (3); *Werle* v. *Colquhoun*. (4) "I should say," said Brett L.J. in *Erichsen* v. *Last* (5), "that wherever profitable contracts are habitually made in England by or for foreigners, with persons in England, because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contracts is done abroad." The correctness of these decisions is expressly recognised in *Grainger* v. *Gough*. (1) Then if Squire & Co. exercise a trade here they are properly assessed in the name of their agents Sandie & Hull by virtue of s. 41 of the Income Tax Act, 1842. Sandie & Hull are bound under s. 51 of that Act to deliver statements of the profits of the trade so exercised by Squire & Co., and the sums of 500*l.* and 1000*l.* mentioned in the case are arbitrary assessments fixed by the commissioners upon the default of Sandie & Hull to deliver the required statements of profits.

*A. T. Lawrence, Q.C.*, and *J. Fox*, for the respondents. The respondents Sandie & Hull are called commission agents, but as their principals Squire & Co. are foreigners there is no privity between those principals and the individual purchasers. An

(1) [1896] A. C. 325.
(2) (1885) 52 L. T. 814.
(3) (1886) 56 L. J. (Q.B.) 155.
(4) (1888) 20 Q. B. D. 753.
(5) (1881) 8 Q. B. D. 414, at p. 418.

agent for a foreign principal has no right to pledge the credit of his principal. Such an agent who in "executing an order ships goods to his principal, is in contemplation of law a vendor to him . . . . The legal effect of the transaction between the commission merchant and the consignee, who has given him the order, is a contract of sale passing the property from one to the other" : per Blackburn J. in *Ireland* v. *Livingstone.* (1) But if the relation between the agent and the foreign principal is that of vendor and purchaser where the agent is employed to buy goods for the principal, it must equally be that of purchaser and vendor where he is employed to sell goods for the principal. In this case upon the consignments of the goods the property in them passed to Sandie & Hull. It is true that if the goods had been destroyed by fire before they were sold to the purchasers the loss would have fallen upon Squire & Co., but it would have done so not because the property was theirs, but because by the terms of their contract they were only to be paid such a price as the goods ultimately realized upon their being sold. Sandie & Hull sold the goods in their own names and on their own behalf. There was consequently no trading by Squire & Co. in this country. But even if the sales by Sandie & Hull were sales on behalf of Squire & Co., still the liability to income tax depends not upon the question whether profits are earned here, but upon the question whether a trade is exercised here. To constitute a trading here there must be both a buying and selling here. In *Sulley* v. *Attorney-General* (2), where a partner in an American firm was in the habit of purchasing goods in this country and consigning them to America for sale there, it was held that the fact of part of the firm's trade being carried on here did not constitute an exercising of a trade here.

*Sir R. E. Webster, A.-G.*, in reply, referred to *Wingate & Co.* v. *Inland Revenue.* (3)

GRANTHAM J. In this case I am of opinion that Messrs. Squire & Co. do exercise a trade within the United Kingdom,

(1) (1872) L. R. 5 H. L. 395, at p. 408. (2) (1860) 5 H. & N. 711.
(3) (1897) 34 Scottish Law Reporter, 699.

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and that consequently they are through their agents liable to be assessed in respect of that trade. Mr. Lawrence's argument was that the only trade carried on here in respect of the goods consigned by Squire & Co. to Sandie & Hull was carried on by Sandie & Hull. That is based on the assumption that the property in the goods passed to Sandie & Hull; but having regard to the facts stated in the case, I think that that cannot be maintained. Sandie & Hull were under no obligation to remit any money to Squire & Co. until they had sold the goods and received the proceeds. If before the goods were sold by Sandie & Hull they were accidentally burnt, it is conceded that the loss would fall upon Squire & Co. It is said that the reason why Squire & Co. would have to bear the loss is not that the property was theirs, but that they had agreed that they were only to be paid such a price as the goods should ultimately realize less commission and charges, and that as the goods would in that event never be realized they would not be entitled to be paid. I cannot agree with that view. I think that the true inference is that the goods were all along the goods of Squire & Co. Then if so there is a trading with these goods in this country by Squire & Co. through their agents, Sandie & Hull. There must be judgment for the Crown.

CHANNELL J. I am of the same opinion. The principles governing the liability to income tax of foreign traders employing agents in this country are perfectly well settled by the numerous cases upon the subject. The only question is as to the application of them to the facts of this particular case. If Mr. Lawrence could have made out that Sandie & Hull purchased from Squire & Co. at a price to be subsequently ascertained by reference to what the goods fetched on the sub-sales, it might have been a question whether there was any trade carried on here by Squire & Co. But the only fact that he has got to support that contention is that the sub-sales are made by Sandie & Hull in their own name, and that under those circumstances they are as between themselves and the sub-purchasers principals, upon the presumption which exists that where a sale is made by an agent in this country on behalf of a foreign

principal credit is primâ facie given to the agent, and that the agent and not the foreign principal is treated as the principal in the transaction. But to my mind that presumption has no application except as between the parties to the sale. I think it is quite consistent with goods being treated as the property of the agent as between the agent and the purchaser that, as between the agent and his foreign principal, the goods should be in fact the goods of the principal.

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Channell J.

*Judgment for the Crown.*

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Rowcliffes, Rawle & Co., for Stone, Fletcher, Hull & Stone, Liverpool.*

J. F. C.

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## *In re* A SOLICITOR. *Ex parte* THE INCORPORATED LAW SOCIETY.

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*Solicitor—Misconduct—Application to strike off the Rolls—Jurisdiction—Order of Colonial Court.*

On the hearing of an application to strike the name of a solicitor off the Roll of Solicitors of the Supreme Court, it was proved that an order had been made by the Supreme Court of a Colony to strike the name of the solicitor off the roll of solicitors of that court for misconduct, but no direct evidence of the facts constituting the alleged misconduct was produced before the Divisional Court:—

*Held*, that, in the absence of legal evidence of the alleged misconduct, the Court could not act on the order of the Colonial Court alone, and the application must be refused.

MOTION on behalf of the Incorporated Law Society that the name of a solicitor be struck off the Roll of Solicitors of the Supreme Court. From an affidavit filed in support of the motion it appeared that the solicitor had practised in the Colony of the Cape of Good Hope, and that on February 29, 1896, an order had been made by the Supreme Court of the Colony, on the petition of the Incorporated Law Society of the Colony, to strike the name of the solicitor off the Roll of Solicitors of the Supreme Court of the Colony, on the ground

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of professional misconduct on his part; but no direct evidence was produced before the Divisional Court as to the nature or circumstances of the alleged misconduct. It was proved that the solicitor had had personal notice of the present proceedings.

*Hollams*, for the Incorporated Law Society, in support of the motion. It must be admitted that there is no precedent exactly in point to support the present application, but by analogy to the practice of the old Courts of Common Law at Westminster, this Court can, and ought to, act upon the decision of the Supreme Court of the Colony of the Cape of Good Hope. In *In the Matter of John Collins* (1) the Court of Common Pleas made absolute a rule that an attorney of that court be struck off the roll of that court, upon the production of a rule striking him off the roll of the Court of Queen's Bench for misconduct. Jervis C.J. said: "Out of deference to that Court, we do not inquire into the circumstances upon which they acted." Here, moreover, there is the petition of the Incorporated Law Society of the Colony, sworn to by the president of the society, and exhibited to the affidavit filed in support of the present motion. That shews the ground on which the order of the Colonial Court was made, and furnishes evidence on which this Court is entitled to act.

[DARLING J. Would the benchers of one of the Inns of Court be justified in disbarring a barrister, merely on proof that he had been disbarred in a Colony by order of a competent authority?]

Yes, provided he had due notice of the application made against him here. Great difficulty will be experienced in dealing with cases of this nature, if it is held to be necessary in every case to procure direct evidence from the Colony. At least this Court has a discretion, and would be justified in acting on the materials now before the Court.

The solicitor did not appear.

WRIGHT J. I cannot in any way complain of the course taken by the Incorporated Law Society in bringing this matter

(1) (1856) 18 C. B. 272.

before the Court, but I am of opinion that we cannot properly grant the order asked for by the present application. The suggested precedent, derived from the former practice of the Courts of Common Law at Westminster, is not one which applies to the case now before us. The old Courts of Queen's Bench, Common Pleas, and Exchequer were courts of co-ordinate jurisdiction for many purposes, and were acting in harmony with one another, and, in the case of applications of this nature, were dealing with attorneys, who were usually officers of all the three courts, and entitled to practise in them all. No case has been shewn to us which amounts to an authority for the proposition that we ought to act on the order of the Colonial Court. How are we to say what description of Court it is which has made the order on which we are invited to act? And is it suggested that the same practice would apply in the case of a strictly foreign court? We know nothing of the rules of procedure, or of the laws as to evidence which prevail in the Supreme Court of the Colony of the Cape of Good Hope. We have before us only the affidavit of the president of the Incorporated Law Society of the Colony, which necessarily is founded on mere information and belief, and we have nothing to enable us to judge as to the merits of the case. I cannot think that we ought to make the order which is asked for simply on the ground that the Supreme Court of the Colony has made an order that the solicitor be struck off the rolls, or that the order of that Court is binding on us. I do not wish to say that there can never be a case of this kind in which the Court ought to act, if the facts are properly brought before them, but this has not been done in the present case. I am of opinion that the order applied for by the Incorporated Law Society ought to be refused.

Darling J. I quite agree. I have great regard for the judgment of the Supreme Court of the Colony of the Cape of Good Hope, but there is no analogy between the case of an order of a Colonial Court and the case of an order of one of the Courts of Queen's Bench, Common Pleas, and Exchequer, sitting at Westminster. In the latter case the same rule

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would be applied with regard to officers of the courts, for the different courts acted in harmony with one another. No doubt, if there were evidence at first hand, this Court would regard the decision of the Colonial Court with deference, and would consider it in arriving at a conclusion; but where, as here, there is no evidence before us, but only the mere decision of the Court, we ought not to act on that alone.

*Motion dismissed.*

Solicitor for Incorporated Law Society: *E. W. Williamson.*

P. B. H.

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*Jan.* 19.

[IN THE COURT OF APPEAL.]

## THE QUEEN *v.* THORNTON AND OTHERS, JUSTICES. *Ex parte* LACON & CO., LIMITED.

*Licensing Acts—Licence—"Off-Licence"—Order sanctioning Removal—Application for New Licence—Notice of Application—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 50.

Where the holder of an "off-licence" for the sale of beer, wine, and spirits in respect of certain premises, who had at the general annual licensing meeting obtained a renewal of that licence, proceeded also to apply for a new licence of a similar description in respect of other premises, and the licensing justices granted the application on condition that he gave up the licence for the first-mentioned premises, and ceased forthwith to carry on the sale of beer, wine, and spirits there, which he agreed to do:—

*Held*, that the application, being in substance one for an order sanctioning removal of a licence, came within s. 50 of the Licensing Act, 1872, and, therefore, the justices had no jurisdiction to grant it unless the requirements of that section were satisfied.

APPEAL from an order of a Divisional Court (Cave and Ridley JJ.), making absolute an order for a certiorari to remove into the High Court, and to quash an order made by the licensing justices for the Wandsworth division of the county of London granting a licence to the appellant, one Laceby, in

respect of No. 2, Abercrombie Street, Battersea, for the sale of beer, wine, and spirits, to be consumed off the premises. (1)

It appeared that the appellant was in 1897 the holder of an "off-licence" for the sale of beer, wine, and spirits in respect of premises known as the Five Alls, of which he was tenant. He was also the holder of a similar licence in respect of the cellars only of the adjoining house, No. 2, Abercrombie Street, which he used for the purpose of affording additional storage-room in connection with his business at the Five Alls. At the general annual licensing meeting in March, 1897, he applied to the licensing justices for, and obtained, renewals of the above-mentioned licences. He then applied, having given the proper notices of an application for a new licence, for a new "off-licence" for the sale of beer, wine, and spirits in respect of the whole house No. 2, Abercrombie Street. He had given no notice of this application to E. Lacon & Co., the owners of the Five Alls, but they, having heard of his intention to make it, appeared and objected thereto. The justices refused to entertain this application, unless the appellant would undertake, if it were granted, to surrender the licence for the Five Alls and to cease selling beer, wine, and spirits there. The appellant undertook to do so. The justices then adjourned the application in order that they might view the premises No. 2, Abercrombie Street. At the adjourned hearing they stated that, having viewed the premises, they were of opinion that they would be more suitable for public requirements than the Five Alls, and they were therefore prepared to remove the restriction on the licence for No. 2, Abercrombie Street, by which it was confined to the cellars, on the appellant surrendering the licence for the Five Alls, and undertaking to cease forthwith the sale of beer, wine, and spirits on those premises; and they accordingly made an order granting an "off-licence" for the sale of beer, wine, and spirits in respect of the whole of the premises No. 2, Abercrombie Street. An order nisi was subsequently obtained by E. Lacon & Co. to bring up the order of the justices and quash the same as being made without jurisdiction. On the argument the Divisional Court made the order absolute on the ground that

(1) See [1897] 2 Q. B. 308.

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the order of the justices was in substance an order sanctioning the removal of a licence within the meaning of s. 50 of the Licensing Act, 1872, and therefore they had no jurisdiction to make it, no notice of the application having been served upon the owners of the Five Alls as required by that section. (1)

*Bosanquet, Q.C.*, and *J. C. Earle*, for the appellant. (2) The justices had jurisdiction to grant the licence which they granted. This was a case not of an application for a removal of a licence within s. 50 of the Licensing Act, 1872, but of an application for a new licence to which that section does not apply. It is admitted that the justices would have had no jurisdiction to make an order sanctioning a removal of the licence from the Five Alls, but this was not such an order. It was an order granting a new "off-licence" for No. 2, Abercrombie Street. It may be that the condition which the justices imposed upon the appellant to the effect that he must cease to carry on business at the Five Alls was invalid, but they clearly had jurisdiction to grant a new licence for the house in Abercrombie Street. The licence was granted by the justices under the Wine and

(1) The Licensing Act, 1872, s. 50: "Licences may be removed from one part of a licensing district to another part of the same district, or from one licensing district to another licensing district within the same county, in manner following: The application for an order sanctioning removal shall be made by the person desiring to be the holder of the licence when removed, and shall be made at a general annual licensing meeting, or any adjournment thereof, to the justices authorized to grant new licences in the licensing district in which the premises are situated to which the licence is to be removed. Notice of the intended application shall be given in the same manner as notice is given of an application for the grant of a new licence. A copy of the notice shall be personally served upon, or sent by registered letter to, the owner of the premises from which the licence is to be removed, and the holder of the licence, unless he is also the applicant. The justices to whom the application is made shall not make an order sanctioning such removal, unless they are satisfied that no objection to such removal is made by the owner of the premises to which the licence is attached, or by the holder of the licence, or by any other person whom such justices shall determine to have a right to object to the removal. Subject as aforesaid, such justices shall have the same power to make an order sanctioning such removal as they have to grant new licences. . . ."

(2) It will be seen that the argument for the appellant varied somewhat from that before the Divisional Court.

Beer House Act, 1869 (32 & 33 Vict. c. 27). The effect of s. 8 of that Act, as extended by the Licensing Act, 1872, s. 69, was that in the case of an application for the grant of a new "off-licence" for the sale of beer, wine, and spirits, or for a renewal of such a licence, the justices could only refuse the application on one of four grounds, none of which existed in the present case. This state of things still exists with regard to wine and spirits, but it was altered, so far as beer is concerned, by 45 & 46 Vict. c. 34, s. 1, which gave the justices an unqualified discretion to refuse an "off-licence" for the sale of beer. Therefore, as regards the sale of wine and spirits, the justices were bound in the absence of any of the four grounds to grant a new "off-licence" in respect of any premises upon application made to them: and could not impose as a condition of granting the licence for No. 2, Abercrombie Street that the licence must be removed from the Five Alls, which condition is therefore invalid so far. The application for removal of a licence contemplated by s. 50 of the Licensing Act, 1872, has really become obsolete and is unnecessary now. It was a novelty introduced in the year 1871 by the Intoxicating Liquors (Licences Suspension) Act, 1871 (34 & 35 Vict. c. 88), now repealed, with reference to a period when new licences could not be granted: see Paterson's Licensing Acts, 11 ed. p. 106. The appellant applied not for a removal of the licence of the Five Alls, but for a new licence for No. 2, Abercrombie Street. The justices had a discretion to refuse the appellant's application for a renewal of the licence of the Five Alls, and to grant him a new licence in respect of No. 2, Abercrombie Street. If they had done so in the first instance, it could not have been argued that it was a case of removing a licence within s. 50. The appellant already had a licence in respect of part of No. 2, Abercrombie Street, and the application really was only to extend that licence to the whole of the house. The appellant could have abandoned the business he was carrying on at the Five Alls, not being bound by any covenant to continue carrying it on; and he was not bound to apply for a renewal of the licence for those premises. He could have applied to the justices merely for a new licence in respect of No. 2, Abercrombie Street, or any

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other premises. The only effect of what the justices did was to put him in the same position as if he had not applied for a licence in respect of the Five Alls, but only for a new licence for No. 2, Abercrombie Street. The removal of the business has nothing to do with the case. The question is whether there is a removal of the licence in the sense contemplated by s. 50.

The order to quash the justices' order in toto was at any rate wrong, for, as already pointed out, the appellant was clearly entitled to a new "off-licence" for the sale of wine and spirits in respect of No. 2, Abercrombie Street, and the justices could not, so far as the sale of wine and spirits was concerned, impose the condition that the licence must be removed from the Five Alls. Therefore, as regards the licence for wine and spirits, the case was not one of removal of a licence.

*Edwardes Jones* appeared for the justices.

*Lawson Walton, Q.C.* and *Foote, Q.C.* (*Travers Humphreys* with them), for the prosecutors. Sect. 50 of the Licensing Act, 1872, is not repealed, and, if what was done by the justices in substance came within the scope of that section, it is applicable. The application of the appellant was in effect for removal of the licence from the Five Alls to No. 2, Abercrombie Street. Where a licensed person intends to remove his business from licensed premises and carry it on upon other premises, and for that purpose applies for a licence in respect of the latter, that is an application for removal of a licence within the scope of the section, and the justices have no jurisdiction to grant the application, if the owners of the licensed premises object to the removal. The object of the section is that the business which gives to the premises the greater part of their value shall not be removed so as to prejudice the owners of the premises without their consent. When a person who holds an existing licence applies at the general annual licensing meeting for a new licence in respect of other premises, the fact that he already holds a licence would be known, and the justices must inquire whether he intends to transfer the business carried on under that licence to the premises in respect of which he applies for a new licence, and, if that appears to be his intention, the case is one of

removal within s. 50, and the justices must inquire whether he has given notice to the owners of the premises already licensed, and whether they consent to the removal. In each case it would be a question of fact upon the answer to which the justices' jurisdiction to grant the licence asked for would depend, and they must determine that preliminary question. The justices must look at the substance of the matter, and are bound to ascertain whether the applicant is seeking to remove the business. It is clear in the present case that the justices appreciated the nature of the transaction, for they themselves declined to grant the application except on condition that the licence for the Five Alls was given up. By accepting the condition so imposed the appellant made the application in substance one for removal of the licence. It is suggested by the appellant that a licensed person may by adopting the machinery of an application for a new licence obtain in effect a removal of an old licence without being subject to the provisions of s. 50. It is submitted that the substance and not the form of the application must be looked at in order to determine whether a case is within the section. The appellant did not in the present case simply apply for a new licence. He previously applied for and obtained the renewal of the licence for the Five Alls, which would not expire until the end of the succeeding licensing year; but, if he had applied simply for a new licence for No. 2, Abercrombie Street, he must have informed the justices that he was going to remove there, for, so far as the sale of beer is concerned, a licence can only be granted to the real resident holder and occupier of the dwelling-house in respect of which the application for a licence is made: see Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 1. The case would then have appeared to be really one of removal, and s. 50 would apply.

The licence granted by the justices is an entirety, and as such, if made in excess of their jurisdiction, must be quashed.

*Bosanquet, Q.C.*, in reply.

A. L. SMITH L.J. I am of opinion that the order of the Divisional Court was correct. The question in this case, which is a somewhat peculiar one, really is whether the order of the

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justices was an order sanctioning the removal of a licence from the Five Alls to No. 2, Abercrombie Street, within the meaning of s. 50 of the Licensing Act, 1872. I have arrived at the conclusion that the order of the justices was in substance such an order, and therefore could not be made in the face of objection by the owners of the Five Alls.

It appears from the affidavits that the appellant, Laceby, had an "off-licence" for the sale of beer, wine, and spirits in respect of a house known as the Five Alls, and, requiring more space for storage in connection with the business, he had obtained a similar licence in respect of the cellars under an adjoining house known as No. 2, Abercrombie Street. At the general annual licensing meeting in March, 1897, he successfully applied to the justices for a renewal of those licences, and he then made a further application for an "off-licence" for the sale of beer, wine, and spirits in respect of the whole of the house No. 2, Abercrombie Street. The justices said that, before they could entertain that application, he must give up his licence for the Five Alls, and confine his business to No. 2, Abercrombie Street; in other words that, if he would remove his business to No. 2, Abercrombie Street, they would grant him a licence for that house. He agreed to this proposition. I think that what the justices in fact did was to grant the appellant a licence for No. 2, Abercrombie Street on condition that he would remove the business from the Five Alls and carry it on in future at No. 2, Abercrombie Street. I do not stop to inquire as to the form of the order which they made. I think the substance of it was to sanction the removal of the licence. In my opinion where a person who holds a licence for premises in a district makes an application for a licence for other premises in the district with the intention of abandoning the old premises and transferring the business to the new premises, if required, that is a case of removal of a licence within the meaning of s. 50 of the Licensing Act, 1872.

With regard to the subsidiary point that the justices had jurisdiction to grant the licence for wine and spirits, though not for beer, the licence which they have in fact granted and which is brought up before us is one entire licence for the sale

of beer, wine, and spirits. That licence is one which they had no jurisdiction to grant, and which must therefore be quashed.

CHITTY L.J. I am of the same opinion. I think the facts of this case bring it within s. 50 of the Licensing Act, 1872. That section has not been repealed. It was argued that subsequent legislation had rendered it inoperative, but it still stands, and it appears to me that, if on the facts a case comes in substance within the scope of it, the provisions of the section must be applicable. At the general annual licensing meeting the appellant made three applications in an order which he skilfully selected. The first application was for a renewal of the licence of the Five Alls. The second was for a renewal of the licence in respect of the cellars of No. 2, Abercrombie Street. He succeeded on these applications. He then brought forward an application for a licence for the whole of the house No. 2, Abercrombie Street. The justices would not entertain that application, unless an undertaking was given that he would give up the licence in respect of the Five Alls. It seems to me immaterial in what form the application was originally made. The appellant might have declined to accept the licence on the terms imposed by the justices, but he voluntarily accepted it and undertook to cease forthwith from the sale of beer, wine, and spirits at the Five Alls. That, in my opinion, amounted in substance to making an application for removal of the licence from the Five Alls to No. 2, Abercrombie Street. It is not necessary to say more with regard to the other point taken than that the order of the justices was one entire order, and therefore was rightly quashed as being made without jurisdiction.

COLLINS L.J. concurred.

*Appeal dismissed.*

Solicitors for appellant: *W. W. Young & Son.*
Solicitors for justices: *Corsellis, Mossop & Berney.*
Solicitor for prosecutors: *Wellington Taylor.*

E. L.

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Jan. 20.

## MILLARD *v.* WASTALL.

*Local Government—Nuisance—Abatement Notice—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 94.

The occupier of a factory, the chimney of which caused a nuisance by sending forth black smoke, was served by the local authority with a notice under s. 94 of the Public Health Act, 1875, requiring him within a specified time to abate the same, and for that purpose to abstain at all times from doing or suffering to be done anything which would cause a recurrence of the nuisance:—

*Held*, that the notice was good, and that it was unnecessary that it should go on to require the execution of any works or the doing of anything as a means to the abatement.

CASES stated by justices of Ramsgate.

The respondent was the occupier of a factory in the borough of Ramsgate. On May 7, 1897, and on several subsequent days, black smoke was permitted to issue from the chimney of the factory in such quantities as to be a nuisance. On June 26 the appellant, the inspector of nuisances for the borough, served the respondent with a notice under s. 94 of the Public Health Act, 1875 (1), that the local authority for the borough, being satisfied of the existence of a nuisance of the above nature on the respondent's premises, "do hereby require you within seven days from the service of this notice to abate the same, and for that purpose to abstain at all times hereafter from doing or suffering to be done anything which shall cause the said chimney to send forth black smoke in such quantity as to be a nuisance." The respondent neglected to abate the nuisance, and the appellant thereupon preferred a complaint under s. 95. At the hearing of the complaint it was objected on behalf of the

(1) By s. 94 of the Public Health Act, 1875, "On the receipt of any information respecting the existence of a nuisance the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act default or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose."

respondent that the notice served on him by the appellant on June 26 was not a sufficient notice in pursuance of s. 94 of the Public Health Act, 1875, as it did not specify the works required to be done in order to abate the alleged nuisance, and was not in accordance with the forms in the schedule to the Act, and in support of that objection reliance was placed upon *Reg.* v. *Wheatley*. (1) The justices upheld the objection, and without hearing any evidence dismissed the complaint subject to a case for the opinion of the Court.

*F. Low*, for the appellant. The case of *Reg.* v. *Wheatley* (1), on the authority of which the justices proceeded, does not cover this case. There the nuisance, which arose from untrapped drains, was of a kind which required the execution of works in order to prevent its continuance, and it was accordingly held to be the duty of the local authority to specify in the abatement notice, and of the justices to specify in their order, the nature of the works required. "I am of opinion," said Smith J. (2), "upon the true construction of s. 94, that the notice must be to abate the nuisance within a specified time; and if any works and things are necessary for that purpose, those works and things must be specified." But here there is nothing to shew that any works are necessary; it may be that all that is required is care in the stoking.

No counsel appeared for the respondent.

DAY J. I am of opinion that the notice in this case was sufficient. Where any works are necessary to the abatement of a particular nuisance, and the notice calls upon the person responsible for the nuisance to do the necessary works, the notice must specify what those works are. But here the notice did not call upon the appellant to do any works at all; it simply required him to abstain from permitting black smoke to issue from his chimney. Nor in my judgment was the nuisance of such a nature as necessarily to require the execution of any works.

(1) (1885) 16 Q. B. D. 34. (2) 16 Q. B. D. at p. 39.

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LAWRANCE J. I am of the same opinion. This is one of those nuisances which, like that mentioned in s. 91, sub-s. 3, of keeping an animal so as to be a nuisance or injurious to health, do not necessarily require the execution of any works in order to abate them. The case must go back to be heard upon the merits.

*Case remitted to the justices.*

Solicitors for appellant: *Meredith, Roberts & Mills, for Hubbard, Ramsgate.*

J. F. C.

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*Jan.* 26, 27.

## ROGERS, APPELLANT *v.* THE MANCHESTER PACKING COMPANY, RESPONDENTS.

*Factory Acts—"Factory"—"Non-textile Factory"—"Bleaching and Dyeing Works"—Processes of Hooking, Lapping, Making up, and Packing Cloth—41 & 42 Vict. c. 16, s. 93, Sched. IV., Part I., s. 2.*

Premises, in which the processes of hooking, lapping, making up, and packing cloth are carried on, are a "factory," within the meaning of the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), s. 93, and Sched. IV., Part I., s. 2, even if none of such processes are carried on as incidental to bleaching and dyeing.

CASE stated by the stipendiary magistrate for the city of Manchester.

An information was preferred by the appellant, an inspector of factories, charging that the respondents, being the occupiers of a certain factory, the same being a factory, within the true intent and meaning of the Factory and Workshop Acts, 1878 to 1895, did employ one Agnes Surcliffe, a young person, after 8 P.M., contrary to the provisions of the Acts.

The magistrate dismissed the information, on the ground that the premises of the respondents were not a factory within the meaning of the Acts. (1)

(1) By the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), s. 93, "The expression 'factory' in this Act means textile factory and non-textile factory, or either of such descriptions of factories"; and "The expression 'non-textile factory' in this Act means (1.) any works, warehouses, furnaces, mills, foundries, or places named in Part I. of the fourth schedule to this Act."

Sched. IV., Part I., s. 2, is as

The following facts were admitted by both parties. The respondents were the occupiers of the premises referred to in the information, and they carried on the business of makers up and packers therein. This business was exclusively the hooking, lapping, making up, and packing of cloth for exportation, and, in the course of such business, they received the cloth from their employers, the shipping merchants, in the finished condition in which it was received from the manufacturers. According to the respondents' instructions from the merchant owner of the cloth, the respondents measured and cut it into lengths; and these lengths were then folded in different ways by the respondents, according to the instructions of the shipping merchant. After binding or stitching the ends of the folds together, in order to keep them straight, the cloth was made up into neat parcels, and plain or ornamental labels, descriptive of the contents, were affixed thereon. A number of these parcels were then placed together, and hydraulic pressure was applied to reduce the bulk, and so lessen the cost of the transit. All the above-mentioned processes were carried on by the respondents, who usually despatched the packed goods direct from their warehouse to the shipowners for delivery to the shipping merchant's customers abroad.

The processes hereinbefore described were essential processes

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follows: "'Bleaching and dyeing works,' that is to say, any premises in which the processes of bleaching, beetling, dyeing, calendering, finishing, hooking, lapping, and making up and packing, any yarn or cloth of any material, or the dressing or finishing of lace, or any one or more of such processes, or any process incidental thereto, are or is carried on"; and by s. 93, sub-s. 3, "also any premises wherein, or within the close or curtilage or precincts of which, any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes, or any of them, that is to say . . . . (c) In or incidental to the adapting for sale of any article, and wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there."

By s. 96, a "young person" is defined as "a person of the age of fourteen years and under the age of eighteen years."

By s. 13, the period of employment for young persons in non-textile factories is fixed at from 6 A.M. to 6 P.M., or 7 A.M. to 7 P.M. (with certain exceptions).

Sect. 83 imposes fines for the employment of young persons contrary to the Act.

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in the respondents' business, and were properly called hooking, lapping, making up, and packing; mechanical power was used by the respondents in aid of some of these processes, and by the operation of hooking and lapping the cloth was measured and folded, but none of the processes were carried on by the respondents as incidental to bleaching or dyeing.

The young person named in the information was employed by the respondents on the premises in the process of hooking cloth at 8.50 P.M. on the day stated.

All the processes enumerated in s. 2 of Sched. IV. were frequently carried on together in the same works or premises, which were known as, and were commonly called, bleaching and dyeing works, but one or more of these processes, and in particular hooking, lapping, making up, and packing, were also carried on as separate trades by different employers; one or more of the processes of hooking, lapping, making up, or packing was or were carried on in all bleach and dye works.

It was part of the bargain between the merchant and his customers that the cloth should be made up in a particular way, and the packer was instructed to make up the cloth accordingly in the way in which the merchant knew the customer desired, but such instructions were received from the shipping merchant only.

It was admitted by the respondents that, if their premises came within the definition of a factory, under s. 93, the young person named in the information was employed, contrary to the provisions of the Act, on the day charged.

The question for the opinion of the Court was whether, upon the facts above stated, the respondents' premises were a factory, within s. 93 of the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16).

*The Attorney-General* (*Sir Richard Webster, Q.C.*) (*H. Sutton* with him), for the appellant. The decision of the magistrate was wrong, and he ought to have convicted the respondents. He was mistaken in acting on the decision in *Howarth* v. *Coles* (1), where the Court of Common Pleas held, on an Act since

(1) (1862) 12 C. B. (N.S.) 139.

repealed, that "finishing" must be incidental to dyeing. Since that case was decided the law relating to factories and workshops has been consolidated and amended, and the Acts previously in force repealed, by the statute referred to in the case stated by the magistrate—the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16). The magistrate has overlooked the words in s. 2 of Sched. IV., "or any one or more of such processes." If the Act of 1878 is compared with the repealed statutes on the same subject, the intention of the Legislature to include within the definition of "factory" such premises as those described in the case becomes apparent. The appellant would be entitled to succeed on the words "in or incidental to the adapting for sale of any article" in s. 93, sub-s. 3 (*c*), but prefers to rest his contention on the broader ground already indicated.

*A. M. Lazarus-Langdon*, for the respondents. The decision of the magistrate was right. The premises of the respondents were not a factory within the meaning of s. 93, because, in the first place, the hooking, lapping, making up, and packing, were not carried on incidentally to bleaching and dyeing; and, secondly, the operation of folding and making up the cloth was not an adaptation for sale. The expression "bleaching and dyeing works" must be read in a natural sense, not as a term of art, and if so read would not include the premises of the respondents as described in the case.

*The Attorney-General* was not heard in reply.

DAY J. In my opinion this case is perfectly clear and free from doubt. The Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), s. 93, defines "non-textile factory" as meaning, among other things, any works, warehouses, furnaces, mills, foundries, or places named in Part I. of Sched. IV.; and Part I. of Sched. IV., by s. 2, includes "'Bleaching and dyeing works,' that is to say, any premises in which the processes of bleaching, beetling, dyeing, calendering, finishing, hooking, lapping, and making up and packing, any yarn or cloth of any material, or the dressing or finishing of lace, or any one or more of such processes, or any process incidental

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Day J.

thereto, are or is carried on." I am inclined to think that the premises of the respondents referred to in the case are not a "warehouse" within the meaning of the Act; but they certainly are "works," and I think also they are a "place." In order to come to a conclusion as to whether the premises in question are a factory, within the meaning of the Act, it is necessary to consider whether they are "bleaching and dyeing works," as defined by s. 2 of Part I. of Sched. IV., which I have read, and not whether they come within the natural meaning of those words, without reference to the statutory definition. I am of opinion that the respondents' premises were a factory within the meaning of s. 93, and therefore the respondents ought to have been convicted.

LAWRANCE J. I entirely agree.

*Judgment for the appellant.*

Solicitor for appellant: *The Treasury Solicitor.*

Solicitors for respondents: *Pritchard, Englefield & Co., for Hill & Doughty, Manchester.*

P. B. H.

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C. A.
1898
*Jan.* 17.

[IN THE COURT OF APPEAL.]

## GOWER *v.* COULDRIDGE AND OTHERS.

*Practice—Joinder of Defendants—Separate Causes of Action against all and against some of Defendants—Order* XVI., *r.* 5; *Order* XVIII., *rr.* 1, 8.

Where several defendants are sued, a claim for damages in respect of a tort alleged against some of them cannot be combined with a claim for damages in respect of a separate tort alleged against all.

APPEAL from an order of a judge at chambers.

The action was brought against three defendants, who were directors of a company called Richard Spurgeon, Limited, of which the plaintiff was a shareholder. The statement of claim alleged a fraudulent conspiracy by two of the defendants, Couldridge and Newman, to promote a company to buy a worthless business, and to induce the plaintiff to take and pay

for the shares, which he did, and suffered loss thereby. The third defendant, Maw, was not charged with being a party to the conspiracy. There was an allegation of the statutory liability of all three defendants under the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64), and also an allegation against all three of false and fraudulent representations in the prospectus of the company.

The defendant Maw applied at chambers for an order to strike out the first of the allegations in the statement of claim, and the master made what was in effect an order that the plaintiff should elect whether he would proceed on the claim against the two defendants or on those against all three. The learned judge at chambers reversed this order, and the defendant Maw appealed.

1898. Jan. 12. *M. M. Macnaghten*, for the defendant Maw. The plaintiff has no right to combine in one action claims for damages against the defendants in respect of their several liability for separate torts: *Sadler* v. *Great Western Railway* (1); and he ought to be put to his election to proceed on his first charge against the two defendants, or on his second and third charges against all three. The defendant Maw would be greatly prejudiced at the trial if the plaintiff is allowed to go into the charge of conspiracy against the other two defendants.

*Arthur Powell*, for the plaintiff. The claims arise out of one transaction, and are properly joined in the action. One object of the rules was to avoid multiplicity of actions, Order XVIII., r. 1, allowing causes of action to be joined, and rule 4, as to claims against husband and wife, and rule 6, by which claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant, are illustrations of this. So by Order XVI., r. 1, persons claiming jointly, severally, or in the alternative, may be joined as plaintiffs; and by rule 4 of the same order all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. By rule 5 of the same

(1) [1896] A. C. 450.

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order, "It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him." When this rule is read with those already referred to, it authorizes the joinder of these causes of action by the plaintiff, subject to the question whether the defendant would be embarrassed. In *Sadler* v. *Great Western Railway* (1) the causes of action were independent. There was no combined act of the defendants, only similar concurrent acts, and the case has no application when, as here, there exists a joint cause of action. That case amounted to a wrong joinder of parties, and is not a decision governing this case, but at the most a dictum. *Gort* (*Viscount*) v. *Rowney* (2), *Booth* v. *Briscoe* (3), *Child* v. *Stenning* (4), and *Bennetts* v. *McIlwraith* (5) are authorities in the plaintiff's favour; and in *Smurthwaite* v. *Hannay* (6) Lord Herschell pointed out the difference between the joinder of plaintiffs as parties to the action and the joinder of several causes of action, and the case was decided on the question of joinder of plaintiffs with separate and distinct causes of action.

*M. M. Macnaghten*, in reply.

*Cur. adv. vult.*

1898. Jan. 17. CHITTY L.J. read the following judgment:—In this action the plaintiff seeks to recover damages for the loss he has sustained by taking shares in the company called Richard Spurgeon, Limited. He does not claim any injunction. There are three defendants, all of whom are alleged to be directors of the company.

In accordance with the modern system of pleading, the plaintiff in his statement of claim sets forth facts from which it appears that he has three distinct causes of action. Stated shortly, they are as follows. The first is a fraudulent conspiracy by two of the defendants, namely, Newman and Couldridge, to promote and form the company to buy a worthless business, and to induce the plaintiff to take and pay for the

(1) [1896] A. C. 450.
(2) (1886) 17 Q. B. D. 625.
(3) (1877) 2 Q. B. D. 496.
(4) (1877) 5 Ch. D. 695.
(5) [1896] 2 Q. B. 464.
(6) [1894] A. C. 494.

shares which he in fact took. Although there is a statement that the defendant Maw joined in the promotion of the company, it is clear that he is not charged with being party to the conspiracy. This was admitted by the plaintiff's counsel. The second is a statutory liability founded on the Directors' Liability Act, 1890, in respect of statements in the prospectus issued by all three of the defendants. The third is false and fraudulent representations in the prospectus, also charged against all the defendants. The action, then, is founded on three distinct torts or wrongs committed, as to the second and third by the three defendants, and as to the first by two only.

In these circumstances, the defendant Maw, objecting to the joinder of the first cause of action with the other two, took out a summons, on which the master made an order in substance directing the plaintiff to elect whether he would proceed with the action on the first cause against the defendants Newman and Couldridge only, or on the second and third causes against the three defendants. On appeal, the learned judge in chambers reversed the master's order, and allowed the action in its present form to proceed against all three defendants. The appeal is by Maw from the judge's order. At the bar, the plaintiff's counsel elected, if the Court considered that the judge's order could not be sustained, to strike out from the statement of claim all the allegations relating to the fraudulent conspiracy, and to proceed with the action on the second and third causes only.

In my opinion, the judge's order cannot be sustained. The case is entirely governed by the decision of the House of Lords in *Sadler* v. *Great Western Railway* (1), where it was held that claims for damages against two or more defendants in respect of their several liability for separate torts cannot be combined in one action. The plaintiff's counsel endeavoured in vain to distinguish that case from the present. He referred to Orders XVI. and XVIII., and various rules under those orders, and suggested that the Lords who took part in the decision did not deal with the rules. The suggestion is wholly inadmissible. The rules were necessarily before the House, and

(1) [1896] A. C. 450.

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present to the minds of those who advised the House. The decision lays down a principle applicable to the present system of procedure on the subject, and governs all the rules bearing on the question. It would be idle, therefore, for the Court to enter upon a discussion of the rules or of any of the authorities relating to them other than that case. In the case before us the cause of action founded on the fraudulent conspiracy is an entirely distinct and independent cause: it is wholly separate from the second and third causes. I hold, then, that the defendant Maw is entitled, as a matter of right, regard being had to the plaintiff's election at the bar, to have all the allegations relating to the conspiracy struck out from the statement of claim; and the order will be to that effect.

No question, therefore, arises as to the exercise of any discretion by the Court on the ground of embarrassment to the defendant Maw. Had that question arisen, I should have arrived at the same conclusion.

COLLINS L.J. I am of the same opinion. I only wish to add this remark—that if the interpretation of the rules were now under discussion, the principle underlying them is explained and the difficulties raised by the counsel for the plaintiff are dealt with by Lord Russell in the judgment of the House of Lords in *Smurthwaite* v. *Hannay*. (1)

*Appeal allowed.*

Solicitor for plaintiff: *T. Durant, for E. Cecil Durant, Windsor.*

Solicitors for defendant Maw: *Learoyd, James & Mellor.*

(1) [1894] A. C. 494.

A. M.

[IN THE COURT OF APPEAL.]

C. A. 1898 *Jan.* 12.

## LORD MONKSWELL and Others, Petitioners; THOMPSON, Respondent.

*Practice—School Board Election—Petition—Interlocutory Order—Appeal to Court of Appeal—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *Part IV. s.* 93, *sub-s.* 7—*Municipal Elections (Corrupt and Illegal Practices) Act*, 1884 (47 & 48 *Vict. c.* 70), *s.* 36—*General Rules*, 1883, *for the Execution of Part IV. of the Municipal Corporations Act*, 1882, *rules* 48, 57.

From an order of a judge at chambers in an interlocutory application arising in a school board election petition an appeal lies to the Court of Appeal.

Appeal from an order made at chambers on a petition under s. 87 of the Municipal Corporations Act, 1882.

The petition was against the return of the respondent as a member for the Chelsea division of the School Board of London on the ground that he had not been duly elected by a majority of lawful votes. The petitioners applied under s. 93, sub-s. 7, of the Municipal Corporations Act, 1882, for an order that a special case should be stated, and that there should be a recount of the votes. Kennedy J. made an order for a recount of the votes of certain of the candidates, including the respondent.

The respondent appealed on the ground that the order should have been for a general recount of the votes for all the candidates.

*Willoughby Williams* (*S. H. Day* with him), for the petitioners. There is a preliminary objection to the hearing of the appeal. Sect. 36 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), applies the provisions of Part IV. of the Municipal Corporations Act, 1882, to school board elections. By rule 48 of the General Rules, 1883, for the effectual execution of Part IV. of the Municipal Corporations Act, 1882, it is provided that an application to state a special

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case may be made by motion in the High Court of Justice, or by a summons before a judge thereof. The question whether an order should be made to state a special case is one of discretion, and is not matter of appeal to this Court. Further, by s. 93, sub-s. 7, of the same Act, the decision of the High Court on a special case is to be final; so that if an appeal lies on the order made by the learned judge, the incongruity will arise that a decision on the special case is final, but that a decision as to whether there shall be a special case is not final.

*Yarborough Anderson*, for the respondent. The application is an interlocutory one preliminary to the petition, and not finally determining the rights of the parties. It is governed by the ordinary practice relating to interlocutory applications. The point is concluded by the decision of this Court in *Harmon* v. *Park*. (1)

*Willoughby Williams*, in reply.

CHITTY L.J. I am of opinion that the question raised on this preliminary objection is governed by the decision in *Harmon* v. *Park*. (1) There is no material distinction between the rule upon which that decision was founded and rule 57 of the General Rules made to carry out Part IV. of the Act of 1882. (2) We must therefore overrule the objection, and hear the appeal on the merits.

COLLINS L.J. I am of the same opinion.

*Objection overruled.*

Solicitors for petitioners: *Radford & Frankland.*
Solicitors for respondent: *S. R. Lewin & Co.*

(1) (1880) 6 Q. B. D. 323.

(2) Rule 57: "All interlocutory questions and matters, except as to the sufficiency of the security, shall be heard and disposed of before a judge, who shall have the same control over the proceedings under the Municipal Corporations Act, 1882, as a judge in the ordinary proceedings of the High Court, and such questions and matters shall be heard and disposed of by any judge of the High Court."

A. M.

[IN THE COURT OF APPEAL.]

C. A. 1897 Dec. 3.

## IN THE MATTER OF ESTATE DUTY PAYABLE ON THE DEATH OF THE SECOND EARL COWLEY.

*Revenue—Estate Duty—Mortgage of Settled Property—Mortgage by Tenant for Life and Tenant in Tail—Annuity to Tenant in Tail—Cesser of Annuity on Death of Tenant for Life—Value of Property Passing on Death of Tenant for Life—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*b*); *s.* 7, *sub-s.* 1 (*a*), *sub-s.* 7 (*b*).

Property being settled upon a father for life with remainder to his son in tail, the father mortgaged his life interest, and subsequently the father and son joined in executing a disentailing assurance whereby they settled the property to such uses as they should jointly appoint, and subject thereto in the same manner as it was theretofore settled. The father and son jointly borrowed money on mortgage of the settled property, and under their joint power appointed, and as beneficial owners conveyed, the property to the mortgagees. The existing mortgage of the father's life interest was transferred to the new mortgagees as a further security for their advance. The balance of the money borrowed, after paying off the prior mortgagee, was paid in part to the father and in part to the son. Subsequently, by an indenture of resettlement, the father charged his life interest with the payment during his life of an annuity to the son. In 1895, while the mortgage was still subsisting, the father died, and the son succeeded to the equity of redemption of the settled property:—

*Held*, that for the purpose of computing the value of the property passing on the death of the father and liable to estate duty under the Finance Act, 1894, no deduction should be made from the gross value of the settled property in respect of any part of the mortgage debt, or in respect of the capitalized value of the annuity.

CROSS-APPEALS from a judgment of a Divisional Court, reported [1897] 2 Q. B. 47.

The case came before the Divisional Court on a petition by the third Earl Cowley, on appeal from a decision of the Commissioners of Inland Revenue. The petitioner claimed to be entitled to deduct, from the aggregate value of the property which passed to him on his father's death, the whole amount of a mortgage debt, or such part thereof as was paid to or expended for the benefit of the second Earl out of the money borrowed on mortgage, and also the capital value of an annuity which the second Earl had covenanted to pay during

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his life to the petitioner, and which ceased on the death of the second Earl. The Divisional Court (Pollock B. and Bruce J.) allowed the deduction in respect of the whole mortgage debt, and against this judgment the Crown appealed, but they disallowed the deduction in respect of the annuity, and against this part of the judgment the petitioner appealed.

The facts out of which the claims for deduction arose are stated in the judgments of the Court.

Nov. 10. *Sir R. E. Webster, A.-G.*, and *Sir R. B. Finlay, S.-G.* (*Vaughan Hawkins* with them), for the Crown. The contention for the Crown is that, for the purposes of the Finance Act, 1894, the whole value of the mortgaged property passed on the death of the second Earl Cowley. The contention for the petitioner is that, in estimating the value of the property passing there must be a deduction from the value of the settled property of the amount of the mortgage debt to the Prudential Assurance Company, or, in the alternative, of so much of the mortgage money as was received by the second Earl.

The mortgage to the Prudential Assurance Company was in substance two mortgages, one being a mortgage by the second Earl of his life interest, and the other a mortgage by the petitioner of his reversionary interest. It cannot make any difference that the two interests were mortgaged by the same deed. If the second Earl Cowley had mortgaged his life interest by one deed, and the petitioner had mortgaged his reversionary interest by another, it could not have been contended that the whole value of the property did not pass to the petitioner within the meaning of the Finance Act, 1894, on the death of the second Earl. The fact that, both wanting money, they agreed together to disentail and resettle the property, and afterwards, by virtue of the joint power of appointment given on the resettlement, joined in mortgaging, does not alter the substance of the transaction, and cannot affect the duty payable under the Finance Act, 1894. It is clear that there can be no right to deduct so much of the mortgage money as went into the petitioner's own pocket.

It is submitted also that there is no right to deduct the portion of the mortgage money which was received by the second Earl under any of the sections of the Finance Act, 1894. Sect. 2, sub-s. 1 (*b*), of the Act applies to the case of a life interest in property ceasing by the death of the tenant for life, in which case the property is to be deemed to pass to the extent to which a benefit accrues or arises by the cesser of the life interest. The question is as to the extent to which property passed and not as to the extent to which the petitioner was benefited on the cesser of the life estate. It would be absurd to say that, if the second Earl Cowley had sold his life interest and spent the proceeds of the sale, there was not nevertheless an interest which passed on his death to the petitioner. If the second Earl had an interest which passed on his death, it could make no difference that he had sold or otherwise assigned it. Alienations by tenants for life or remaindermen in such cases cannot affect the amount of duty payable. Sect. 7, sub-s. 1, contemplates a case where, a charge having been created on property by the owner, the property passes subject to the charge. Here the charge on the life estate determined with that estate, and therefore the property did not pass subject to that charge. This incumbrance was not an incumbrance on the estate that passed within the meaning of the Finance Act. When the property passed to the petitioner, the only incumbrance was that created by his own act in mortgaging his remainder. It cannot be that the amount of that incumbrance is to be deducted. The petitioner must read the words of s. 2, sub-s. 1 (*b*), as equivalent to "to the extent to which a benefit was enjoyed by the deceased," a meaning of which they are not capable. According to that view, if the second Earl Cowley had mortgaged his life interest to its full value, nothing would have passed to the petitioner on his death. If the petitioner had mortgaged his reversionary interest to its full value, or sold it out and out, still for the purposes of the Act the property would pass to its full value. The petitioner will rely on the fact that the mortgage was effected under the joint power of appointment given by the disentailing deed. But at the date of that mortgage there was

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already subsisting a mortgage of the second Earl's life estate to the London Assurance Corporation, which had been assigned to the Prudential Assurance Company, and the subsequent exercise of the joint power, so far as the life estate was concerned, would only affect the equity of redemption, and therefore there would be no merger of the life interest by the mortgage to the Prudential Assurance Company, and the incidence of the tax cannot be affected. The general rule is that the interests created under a power must be read into the deed creating the power. Therefore the case stands on the same footing as if in the resettlement of the estate the second Earl and the petitioner had respectively mortgaged their respective interests. The Divisional Court refused to allow the deduction claimed in respect of the capital value of the annuity of 3000*l.*, but it is impossible to distinguish in principle between this deduction and that which they have allowed.

[They cited *Lord Braybrooke* v. *Attorney-General.* (1)]

*Haldane*, *Q.C.*, and *H. Fellows*, for the petitioner. It is not denied that, if a tenant for life mortgages his life interest, on his death the mortgage debt cannot be deducted in estimating the value of the estate which passes for the purposes of the Finance Act. The point upon which the case for the petitioner depends is that this was not merely a case where an incumbrance was created upon the life estate of the second Earl, but one in which an incumbrance was created upon the fee simple of the estate. What was done was not equivalent merely to a mortgage of the life estate of the second Earl, and a separate mortgage of the petitioner's remainder, but one entire, undivided incumbrance on the whole property was created which diminished pro tanto the amount of interest which passed. Otherwise a startling distinction is made between the effect of a sale and that of a mortgage. Suppose the second Earl and the petitioner had joined in selling the estate out and out under the resettlement, could it then be said that an interest passed within the meaning of the Act on the second Earl's death? The case of a mortgage affecting the fee simple of the whole estate stands on the same footing as a sale. The

(1) (1860) 9 H. L. C. 150.

mortgage under the joint power did not operate as a conveyance of the life estate and a separate conveyance of the remainder. The two were merged, and the conveyance operated as a conveyance of the fee. In the case of legal estates that would be the result, and, if the estates were equitable, the same result would follow in the absence of provision to the contrary. It is a question of presumed intention, and equity would presume what was most for the benefit of the parties. It is not contended that the life interest mortgaged to the London Assurance Corporation was not kept alive, but, the second Earl Cowley conveying his equity of redemption and the petitioner conveying his equitable estate in remainder, the two together effected, so far as they were concerned, a conveyance of the complete equitable fee. Mortgagees in such a case as this would be very much astonished by being told that they had not got an interest in fee but two interests, one for life, and the other in remainder, and that, on the cesser of the first, they were liable to render an account under s. 8, sub-s. 4, of the Act, and were chargeable with duty on the value of the property. In the case of *Lord Braybrooke* v. *Attorney-General* (1) Lord Kingsdown said that the resettlement did not for the purposes of s. 15 of the Succession Duty Act alter the title to the property, but in the present case by virtue of the disentailing deed and resettlement a new title was created. It gave to the father and the son together a power of absolute disposition over the estate. By s. 22, sub-s. 2 (*a*), a person is to be deemed competent to dispose of property if he has such a general power as would, if he were sui juris, enable him to dispose of the property, and by s. 22, sub-s. 2 (*b*), a disposition taking effect out of the interest of the deceased person shall be deemed to have been made by him, whether the concurrence of any other person was or was not required. It is submitted that the conveyance to the Prudential Assurance Company took effect out of the joint power to dispose of the fee simple. It does not purport to operate as a conveyance of the respective interests of the father and son, but as an exercise of the joint power of appointment. The only words in the Finance Act

(1) 9 H. L. C. 150.

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which could be supposed to include this case are the words of s. 2, sub-s. 1 (*b*). By those words the Legislature meant to include the case of an estate held by a person for his life or pur autre vie which life estate ceases by his death. They do not apply where there has once been a life estate which has ceased to exist before the death of the life tenant by being merged in the fee simple by virtue of a joint conveyance such as was made in the present case. It is contended that in the present case to the extent of the mortgage no interest passed on the death of the second Earl within s. 2, sub-s. 1 (*b*). If the decision in *Attorney-General* v. *Beech* (1) is contrary to this contention, it is submitted that it is wrong. If this be so, the provisions of sub-s. 7 of s. 7 are not of so much importance in this case, but they also shew that the deduction claimed by the petitioner is correct. This is not a case where an interest really passed on the death of the second Earl, but one of cesser of a prior interest, in which case the property is by the Act to be deemed to pass. What the second Earl Cowley had at his death was only an equity of redemption of a life estate. Sect. 7, sub-s. 7 (*b*), provides for ascertaining "the value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased." The interest which ceased here on the death of the deceased was the equity of redemption of his life estate. The only benefit which accrued or arose on his decease was the cesser of that equity of redemption which was worth less than the life interest by reason of the mortgage.

Sub-sect. 1 of s. 7 of the Finance Act, 1894, which provides that in the cases to which it applies only certain classes of incumbrances shall be deducted, does not apply to the case of a tenant for life, for it says that an allowance shall be made for reasonable funeral expenses, and a remainderman is not liable for the expense of burying a tenant for life. But, if the sub-section does apply, the case falls within the exception of an incumbrance created wholly for the deceased's own use and benefit, and taking effect out of his interest, at any rate, so far as the sum paid to the second Earl Cowley is concerned. The power

(1) [1897] 2 Q. B. 535.

of appointment under which the mortgage was granted was partially carved out of his life interest, and the sub-section does not require that the incumbrance to be within the exception must have been carved wholly out of his interest.

The Divisional Court were wrong in not allowing the deduction of the capitalized value of the annuity which the petitioner was deprived of on the death of the second Earl.

*Sir R. E. Webster, A.-G.*, in reply.

*Cur. adv. vult.*

Dec. 3. The following judgments were read:—

A. L. SMITH L.J. The question raised upon this appeal is upon what amount is estate duty, payable under the Finance Act of 1894, to be assessed upon the estate of the late second Earl Cowley, who died on February 28, 1895: is it to be upon the sum of 538,426*l.* 11*s.* 1*d.*, the then net principal value of what I will call the settled estate, less only the sum of 9140*l.* 17*s.*, or less also the sum of 230,000*l.*, the amount of a mortgage debt more particularly referred to hereafter, and less also the sum of 65,200*l.*, the capitalized value of an annuity of 3000*l.* a year payable to the third Earl Cowley, then Viscount Dangan, by his father the second Earl, during his lifetime? The Commissioners of Inland Revenue have allowed no deductions from the principal value of 538,426*l.* 11*s.* 1*d.*, excepting the sum of 9140*l.* 17*s.* This last sum consisted of what have been called overriding charges upon the settled estates at the date of the death of the second Earl, being the value of annuities charged thereon in favour of annuitants and of another similar charge, and no question is raised by the Crown as to this allowed deduction. The petitioner, the third Earl, who succeeded to the possession of the settled estates upon the death of his father the second Earl, insists that a deduction should also be made in respect of the mortgage debt of 230,000*l.*, as also in respect of the capitalized value of the annuity of 3000*l.* per annum—namely, 65,200*l.*, and these last two sums the commissioners have disallowed as deductions. The Divisional Court has allowed the deduction as regards the 230,000*l.*, and against this

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the Crown appeals. It disallowed the deduction of the 65,200*l.*, and against this the petitioner, the third Earl Cowley, appeals.

The answer to be given to the questions raised depends upon the true construction of the Finance Act, 1894; but before referring thereto it is necessary, considering the course the arguments have taken in this Court, that the dispositions which have taken place in relation to the settled estates should first be clearly understood.

It is true that these dispositions are set out in full detail in the petition of the third Earl Cowley; but, so far as material, they may be conveniently stated as follows: Upon June 27, 1863, the Earl of Mornington by will devised the settled estates to trustees upon trust for the first Earl Cowley for life, and after his death to the second Earl Cowley for life, and after his death upon trust for the first and every other son of the second Earl Cowley in tail male. The testator died on July 25, 1863. The first Earl Cowley thereupon entered into possession of the settled estates, and whilst in possession died on July 15, 1884, and the second Earl Cowley then succeeded to and entered into possession thereof. The second Earl Cowley had previously—namely, on April 1, 1865—exercised a power of jointuring granted to him by the will of the Earl of Mornington, and appointed a rent-charge of 500*l.* a year in favour of his wife the Countess, charged upon the settled estates. The second Earl, after he had entered into possession of these estates, mortgaged his life estate therein to the London Assurance Corporation to secure the repayment to them of large sums of money then borrowed by him of them, and he further secured the repayment thereof by policies of insurance upon his life. In these circumstances it was that the second Earl Cowley and his eldest son (then Viscount Dangan, who was then of age), being each in need of money, agreed to disentail the settled estates, and for that purpose, upon January 14, 1887, executed a disentailing deed, which was duly inrolled, whereby the father and the son conveyed the settled estates, subject to the above-mentioned mortgages and charges, to a trustee upon such trusts as the second Earl and his son might thereafter jointly appoint, and in default of such appointment to the use of

the second Earl for life with remainder to Viscount Dangan in tail.

This disentailing deed having been executed and enrolled, the second Earl and his son proceeded to raise money from the Prudential Assurance Company, and, to summarise the figures, they obtained from that company a loan of 210,000*l.*, afterwards increased by further advances to 230,000*l.*, of which the father (the second Earl) took 199,987 11*s.* 8*d.*, and the son (Viscount Dangan) took 30,012*l.* 8*s.* 4*d.* To secure the repayment of the 210,000*l.* to the Prudential Company a mortgage deed, dated June 8, 1888, was executed by the second Earl and his son, with the concurrence of the Countess Cowley, in favour of the Prudential Company, whereby they transferred to that company the mortgages which the second Earl had given to the London Assurance Corporation, and which were then existing upon his life estate in the settled estates, which mortgages the London Assurance Corporation by deed of the same date conveyed and assigned to the Prudential Assurance Company. The policies upon the second Earl's life were also assigned to the Prudential Company. This mortgage deed recited that it was part of the arrangement for the loan that the mortgage debts to the London Assurance Corporation should be paid off, and that they should be transferred to the Prudential Assurance Company as a further protection and security for their loan; and by this deed the second Earl and his son, as beneficial owners, in the exercise of the power of appointment vested in them by the disentailing deed of January 14, 1887, and in exercise of every or any other power in the behalf appointed, and by virtue of their respective estates and interests, with the consent of the Countess, conveyed to the Prudential Assurance Company the settled estates, to the use of the said company in fee, subject to an equity of redemption reserved to the second Earl and Viscount Dangan, or either of them. In this mortgage deed there is contained the express proviso that the mortgage debts transferred to the Prudential Company should continue on foot, as subsisting charges on the life estate of the second Earl for the benefit of the Prudential Company, by way of an additional security for

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the principal sum then borrowed of that company. Subsequent mortgages were executed to secure the further advances above mentioned and for other purposes; but it does not appear to me to be necessary to go further into them, for what I have already stated, so far as this case is concerned, is sufficient to shew the position of matters when the second Earl died on February 28, 1895.

I cannot doubt that in these dealings with the settled estates as above mentioned the life estate of the second Earl therein was expressly kept on foot as security for the moneys borrowed thereon, and that it was not extinguished or merged into an equitable estate in fee in the Prudential Assurance Company, as excellently argued by Mr. Haldane for the third Earl. The real substance of what was done (and this is what is to be looked at apart from the form of conveyancing) was that the second Earl mortgaged his life estate in the settled estates to the Prudential Company, and that his son mortgaged his reversion in such estates to that company, to secure the repayment of the 230,000*l.*, and that this was the real transaction whether it is to be found carried out by one deed or by two. I cannot agree with the learned judges in the Court below when they held that it was one charge on the fee simple of the settled estates; in other words, an overriding charge thereon. It is true that by the conjoint operation of the father and son the Prudential Company obtained an equitable estate in fee, but the charge remained a charge upon the life estate of the second Earl and upon the reversion of Viscount Dangan. The life estate of the second Earl remained extant until his death on February 28, 1895, charged with the mortgage of 230,000*l.*, when the life estate and the mortgage thereon each ceased and ended. Up to that date the life estate of the second Earl was charged with payment of the interest of the money borrowed on mortgage from the Prudential Company as and when it became due, and also with the annuity of 3000*l.* a year to his eldest son, Viscount Dangan.

I now come to the Finance Act, 1894 (57 & 58 Vict. c. 30). By s. 1 it is enacted that "In the case of every person dying after the commencement of this part of this Act" (which the

second Earl did) "there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty.'" This section would not, I think, embrace the present case, for the life estate of the second Earl ceased at his death and passed to no one.

By s. 2, sub-s. 1, it is however enacted that "property passing on the death of the deceased shall be deemed to include the property following—that is to say, (*a*) Property of which the deceased was at the time of his death competent to dispose" (this does not embrace the present case); "(*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest." This sub-section in my judgment covers the case of the life estate of the second Earl which ceased upon his death, mortgaged as it was to the Prudential Assurance Company, and was intended to embrace such a case, and the extent to which a benefit accrues by the cesser of such interest was the extent of the interest which then ceased, and that is the life estate of the second Earl, and consequently his life estate when he died became property which by the Act was to be deemed to have passed on his death, and comes within s. 2, sub-s. 1 (*b*).

I now come to how by the Act property which is to be deemed to pass upon a death is to be valued for estate duty, and this brings me first of all to s. 7, sub-s. 1. By this sub-section it is enacted that in determining the value of a life estate for the purposes of estate duty allowance shall be made for reasonable funeral expenses, and for debts and incumbrances, as I read the sub-section, if such debts or incumbrances were incurred or created bonâ fide for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest. This, I think, means a debt or incumbrance to take effect out of the estate which passes. This does not appear to me to have any application to an estate, as here, which is deemed to pass, for I do not see how an incumbrance can be created thereon which cannot exist at

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the time of passing. This mortgage debt of the second Earl is not a debt or incumbrance upon an estate which passes or is deemed to pass pursuant to the Act, for the mortgage upon the estate of the second Earl came to an end when that estate also came to an end, and is no longer a charge upon a life estate which was deemed to pass, and was not a debt upon the estate which passed, but only upon the reversion. I agree with the Court below that this s. 7, sub-s. 1, does not apply to this case, though I do not follow their reasons.

I now come to sub-s. 7 of s. 7. This sub-section enacts that "The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased" (these words evidently refer to the property which is deemed to pass as mentioned in s. 2, sub-s. 1 (*b*)), "shall," as I read it, be as follows: (*a*) If the interest ceasing extended to the whole income accruing of the property which shall be deemed to pass the value of the benefit shall be the principal value of that property. This does not apply to this case, because the interest which ceased at the death of the second Earl did not extend to the whole income, but only to the whole income less the charges represented by the sum of 9140*l.* 17*s.* before mentioned; (*b*) If the interest ceasing extended to less than the whole income of the property which shall be deemed to pass, the value of the benefit accruing shall be the principal value of an addition to the property equal to the income to which the interest extended. Now the interest which ceased upon the death of the second Earl in the settled estates did not, as before pointed out, extend to the whole income of the property which should be deemed to pass, and it is under this clause (*b*), therefore, that the value of the benefit accruing is to be ascertained.

I have a difficulty in understanding the exact meaning of the words "of an addition to the property," or for what purpose they were inserted, nor did I hear anything clear as to this in the arguments addressed to us on either side. But whatever may be their true interpretation, they do not mean that the value to be arrived at is by making an allowance for a mortgage debt like the mortgage debt of 230,000*l.* in this case; it is the value of the interest which passes or is deemed to pass

which is to bear the estate duty, and when this interest passed it was no longer (except by the son's own act, about which hereafter) clogged with this mortgage, for when the life estate ceased so did the mortgage thereon.

The learned judges in the Court below say: "If the income to which the interest of the deceased extended is to be taken as the income of the property after deducting the charges on the property 1, 2, 3 (that is, the 9140*l.* 17*s.*), why should not the income to which his interest extended be limited in like manner to the amount he was entitled to receive after the interest upon the mortgages (the 230,000*l.* mortgages) had been paid?" It seems to me that in this there is left out of view this cardinal point, that what is to pay estate duty is the value of the interest which passes or is deemed to pass upon the death, not to the extent to which it may have been enjoyed by the deceased, which may or may not have been during his life diminished by what he had borrowed thereon.

As regards the 9140*l.* 17*s.*, this was charged upon the settled estates, which passed so charged upon the death of the second Earl; but this is not so as regards this mortgage of 230,000*l.*, for the life interest of the second Earl upon which it was charged did not pass so charged, for that mortgage, so far as the life estate was concerned, had come to an end though the estate was deemed to pass. The learned judges say that the "mortgages undoubtedly remained subsisting charges at his death," but the mortgage by the second Earl upon his life estate did not remain, for that was gone; the mortgage, it is true, remained a charge upon what the third Earl came into, but not by reason of anything which the second Earl had done in his lifetime, whose interest we are dealing with, but solely by reason of what the son had done by charging his reversion. It is not upon the value of what the man succeeds to that the estate duty is to be levied; and how can what the reversioner does towards diminishing the value of his reversion, when he gets it, affect what is the value of the property which passes upon a death?

In my judgment, for the above reasons, the value of the benefit accruing upon the death of the second Earl must be

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ascertained under s. 7, sub-s. 7 (*b*), without making any allowance for the 230,000*l.* mortgages. As regards the annuity of 3000*l.* a year charged upon the life estate of the second Earl, and payable thereout during his life to his son, for the reasons I have given above, I think that no deduction for this can be made.

It appears to me that, as before stated, the Finance Act makes liable to estate duty the value of the estate which passes and not the value it may be to any individual successor, and it appears to me that is the key to the construction of the Act; consequently, the point taken by Mr. Haldane—that the third Earl, when he succeeded to the settled estates, was no better off by the cesser of this annuity than he was before—is in reality not in point.

I think that the appeal of the Crown as to the 230,000*l.* mortgage succeeds, that the cross-appeal of the third Earl fails, and consequently judgment must be for the Crown with costs.

RIGBY L.J. This case is of so much importance that I think it worth while, notwithstanding that I shall be repeating to a great extent what has been said by the Lord Justice, to state my own view of the facts, and also to give in my own words the construction of the Finance Act, 1894, so far as it relates to this case.

Out of the somewhat complicated statement contained in the petition I will endeavour to extract what seems to be really material. Under the will of the Earl of Mornington, who died in 1863, and subject to certain overriding charges existing under or by virtue of the said will, certain real estate and money directed to be laid out in real estate (hereinafter for greater clearness referred to as "the settled property") stood limited to the use of the second Earl Cowley for life with remainder to his eldest son, the third Earl Cowley (the petitioner), in tail. The legal estate was outstanding in the trustees of Lord Mornington's will, so that the life estate of the second Earl and the remainder in tail of the third Earl were equitable estates only. The second Earl mortgaged his life interest in the property to the London Assurance Corpora-

tion, and at the date of the disentailing deed next hereinafter mentioned there were subsisting mortgages of that life interest in favour of the London Assurance Corporation for securing payment of annuities to the amount of 5322*l.* per annum during the life of the second Earl, redeemable on payment of 64,248*l.*, and mortgage debts for a further sum amounting to 79,500*l.* On the attainment by the third Earl of his majority in January, 1888, and by a disentailing deed of the 14th of that month (duly inrolled), the estate tail of the third Earl in the settled property was barred, and (omitting minor and unessential complications) the settled property was limited (so far as the father and son were competent to limit it) to such uses as they should jointly appoint, and, in default of appointment, to the use of the second Earl for life, by way of restoration of the life estate vested in him immediately before the execution of the disentailing deed, with remainder to the third Earl in tail, with remainders over.

The life estate of the second Earl having been conveyed, as before mentioned, to the London Assurance Corporation, it was, of course, impossible for the father and son to deal with anything beyond the equity of redemption in the life estate and the reversion thereon in fee simple. The joint power of appointment vested in the two could not have been made to override the security to the London Assurance Corporation, and by the plain language of the disentailing assurance any intention to do so was conclusively negatived. This subordination of the joint power of appointment to the securities of the London Assurance Corporation will prove to be of vital importance when we come to consider the construction of the mortgage to the Prudential Assurance Company.

On June 8, 1888, the amount payable to the London Assurance Corporation, for the redemption of their mortgage on the life interest of the second Earl, consisted of the above-mentioned sums, 64,248*l.* and 79,500*l.* and some arrears of annuities and interest, making altogether 150,853*l.* 6*s.* 7*d.* This sum, at the request of the second and third Earls, was paid to the London Assurance Corporation by the Prudential Assurance Company; and, by an indenture to which the second and third

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Earls were parties, the London Assurance Corporation assigned their annuities and mortgage debts and all arrears thereof, and conveyed the second Earl's life interest in the property to the Prudential Company subject to redemption. The Prudential Company thereby became transferees of all the rights of the London Assurance Corporation. This transfer was part of an arrangement whereby the Prudential Company agreed to lend to the second and third Earls 210,000*l.*, to be secured by the mortgage next mentioned, on the terms that a sufficient part of the loan should be applied for the purpose of obtaining the transfer to the Prudential Company as a further protection and security for the loan. It was also part of the arrangement that 59,146*l.* 13*s.* 5*d.*, the residue of the 210,000*l.* loan over and above the 150,853*l.* 6*s.* 7*d.* paid to the London Assurance Corporation, should be paid to the second and third Earls jointly.

Accordingly by a mortgage deed, dated the same June 8, 1888, but executed after the assignment and conveyance by the London Assurance Corporation to the Prudential Company, in consideration of the 150,853*l.* 6*s.* 7*d.* paid to the London Assurance Corporation, and of the 59,146*l.* 13*s.* 5*d.* paid to the second and third Earls, making up the 210,000*l.*, the second and third Earls jointly and severally covenanted with the Prudential Company to pay the sum of 210,000*l.* with interest.

By the same mortgage deed the second and third Earls, in exercise of the joint power given to them by the disentailing deed, appointed and, by virtue of their estates and interest, conveyed all the settled property to the Prudential Company, to hold to the company, as to such of the premises as were of freehold tenure, to the use of the company in fee simple, and as to the residue freed and discharged, with certain exceptions, from the powers therein mentioned conferred by the will of Lord Mornington, and subject to the charges therein mentioned, to the intent that the premises thereby mortgaged might be held and enjoyed by the company and their assigns freed and discharged from such powers, except as therein aforesaid. The deed contained a proviso for redemption by the second and third Earls, or either of them, or any person interested in the equity of redemption

of the mortgaged premises. The deed also contained the following proviso containing the terms, as between the Prudential Company and the second and third Earls, on which the assigned securities of the London Assurance Corporation were to be held: "Provided always and it is hereby agreed and declared that the several annuities and mortgage debts and interest transferred to the company by the hereinbefore recited indenture of even date herewith and all securities for the same thereby transferred shall continue on foot as subsisting charges on the life estate of the said Earl Cowley party hereto in the trust estate held on the trusts of the will of the said testator for the benefit of the company and their assigns and so as to protect them against all incumbrances and charges if any such there be and by way of an additional security for the said principal sum of 210,000*l.* hereinbefore covenanted to be paid as aforesaid and interest thereon."

Several questions of importance arose on the mortgage deed hereinbefore stated; but before dealing with them it will be convenient to complete the statement of material facts by setting forth, so far as is necessary, the provisions of a deed of resettlement of June 9, 1888, which completed, as between the second Earl and the third Earl, the arrangement under which the 210,000*l.* was borrowed. By that deed it was, among other things, provided (*a*) that the settled property should be held in default of and subject to any appointment under the joint power upon trust and to the intent that the third Earl should receive during the life of the second Earl certain annuities which at the death of the second Earl amounted to 3000*l.* a year, and (*b*) that as between the second Earl, his heirs, executors, and administrators, and the third Earl, his heirs, executors, and administrators, and the persons entitled to the equity of redemption of the mortgaged premises comprised in the mortgage of June 8, 1888, the second Earl, his heirs, executors, and administrators, should be primarily liable for payment of the interest which during his life should accrue due on the mortgage debt of 210,000*l.*, and the third Earl should be primarily liable for the interest which, if the second Earl predeceased the third Earl, should accrue during the residue of the life of the

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third Earl, and that after the death of the longest liver of the two the mortgaged premises should be the primary fund for the payment of the said sum of 210,000*l.* and interest thenceforth to accrue due thereon. By certain deeds of further charge additional sums amounting altogether to 20,000*l.* were borrowed from the Prudential Company under circumstances which made the further advance and the original advance of 210,000*l.* part of a consolidated mortgage debt of 230,000*l.*

We are now in a position to ascertain the true effect of the transactions above described. It was argued that the mortgage deed of June 8, 1888, to the Prudential Company operated to effect a merger of the equitable life estate of the second Earl in the property, and, by the effect of the appointment under the joint power, to vest the fee simple in the Prudential Company free from the life estate. The appointment under the joint power could have no such effect, for no such appointment could override the pre-existing security created by the second Earl in favour of the London Assurance Corporation, and by them transferred to the Prudential Company. The Prudential Company, and they alone, could have effected a merger of the life interest, and it is plain that they intended not to effect but to avoid a merger, not only by their taking the transfer, but by the express provision in the mortgage deed before set out. In such a case the intention of the parties interested must determine whether there is a merger or not. But for the accident of the legal estate being outstanding, there could not have been room for a suggestion of merger. The legal estate during the life of the second Earl would, during the whole of his life, have been vested first in the London Assurance Company, and afterwards in their transferees, the Prudential Assurance Company, and only a surrender could have effected a merger. The life estate of the second Earl subsisted, therefore, until his death and then ceased.

The sum of 150,853*l.* 6*s.* 7*d.* payable for redemption of the mortgages of the London Assurance Corporation was part of the loan of 210,000*l.* As between the second Earl and the Prudential Company the liability of the second Earl arose under his covenant to pay the 210,000*l.* contained in the

mortgage to them, and the rights of the Prudential Company to the transferred securities are defined by the proviso before set out. The result, as I construe the document, was that the Prudential Company had no personal claim upon the second Earl for the 150,853*l.* 6*s.* 7*d.*, or any part thereof, as a separate debt, nor would such a right have been of the slightest advantage to them. This conclusion, however, is in no way necessary for the decision in this case.

As against mesne incumbrancers, if any, the Prudential Company were entitled to treat the annuities and mortgage debts transferred by the London Assurance Corporation as subsisting charges on the life estate of the second Earl. As between himself, however, and the Prudential Company, he was personally liable for the payment of the whole debt of 210,000*l.* and interest. Finally, as between the second Earl and all persons interested in the equity of redemption of the property he was liable only to the interest during his life, and though he might have been sued by the Prudential Company for the whole debt, he would have been entitled to be reimbursed by the third Earl personally as to the interest to accrue after his death during the life of the third Earl, and as to the whole capital sum by the settled property. If he had been called upon to pay and had paid the 210,000*l.* to the Prudential Company, he would have been entitled to an assignment of the 210,000*l.* to himself, or a trustee for him, in order to keep up his rights to reimbursement against the third Earl and the settled property.

At the second Earl's death, which happened on February 28, 1895, the overriding charges under or by virtue of the Earl of Mornington's will consisted of two annuities of 1000*l.* and 500*l.* a year, and a terminable yearly payment of 40*l.* 10*s.*

The third Earl in September, 1895, admitting himself to be accountable for the estate duty properly payable on the settled property, filed an affidavit estimating the principal value of the investments forming part of the settled property at 193,502*l.* 15*s.*, and the principal value of the real estate at 344,923*l.* 16*s.* 1*d.*, making the estimated principal value of the whole settled property 538,426*l.* 11*s.* 1*d.*, which has been in the argument on the appeal accepted as correct.

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From the estimated value the third Earl claimed as deductions the capitalized values of the three overriding charges subsisting under and by virtue of the Earl of Mornington's will, and these deductions have been allowed. He also claimed as a deduction that part of the aggregate loan of 230,000*l.*, which had been expended in paying off the London Assurance Corporation, or otherwise for the benefit of the second Earl, amounting to 199,987*l.* 11*s.* 8*d.*, or alternatively the whole 230,000*l.* He claimed as a further deduction the sum of 65,200*l.* as the capitalized value of the annuities, amounting to 3000*l.* per annum charged upon the whole settled property, which were payable to him during the life, and ceased upon the death, of the second Earl. The learned judges in the Court below allowed the deduction of the whole sum of 230,000*l.*, but disallowed the deduction of 65,200*l.* on account of the annuities for 3000*l.* There was an appeal on behalf of the Crown from the allowance of the 230,000*l.*, and a cross-appeal by the third Earl against the disallowance of the 65,200*l.*

The validity of these claims depends upon the construction of the Finance Act, 1894, Part I. Part I. of the Act is for present purposes a separate Act, and will hereafter be referred to as the Act; it is concerned with the creation and incidence of a new duty called estate duty, and what may be conveniently called the general scheme of the Act is concisely but comprehensively set forth in s. 1. The occasion on which the duty is to arise is the death of any person dying after the commencement of the Act, called in the Act and hereinafter "the deceased." The duty is to be levied and paid upon the principal value of all property, real and personal, settled or not settled, which passes on the death of the deceased. The very general word "passes" is not a technical word, but one capable of the widest possible meaning, and there is nothing in the general scheme to limit its meaning to property of the deceased. Indeed, in connection with the words "settled or not settled," it seems to involve plainly property which did not belong to the deceased, and may even never have belonged to him. So far as the general scheme is concerned there is no reference to the persons to whom the property passes, or the amount of

benefit taken by them, and the duty is leviable indifferently whether they are relatives of the deceased or strangers in blood. In other words, there is no reference to or implication of that relation of predecessor and successor or the existence of a succession which forms the basis of the Succession Duty Act, 1853. The duty is in no sense a duty on successions, but in respect of the value of the property passing from or to what person soever it passes. It is an essential feature of the general scheme that the duty is to be a graduated duty, and to be taken in lieu of the existing duties mentioned in the first section; but with these provisions we are not directly concerned in the present case, though it may be observed in passing that the rate of duty does not in general depend at all upon the way in which the property passing becomes distributed upon the death of the deceased.

The general scheme of the Act thus being ascertained by the first section, the rest of the Act (so far as it is necessary for present purposes to deal with it) is concerned with express provisions creating exceptions from the duty, the method (which in the present case is important) of ascertaining the principal value of the property, the mode in which the duty is to be graduated and raised, and provisions explanatory of the terms of the first section. The second section contains the most important for present purposes of these explanatory provisions. It provides by sub-s. 1 that property passing on the death of the deceased is to include the property following: "(*a*) Property of which the deceased was at the time of his death competent to dispose." We are not here concerned directly with this sub-section, but it is not perhaps unimportant to mention it as indicating, in connection with the subsequent explanatory clauses of the Act, how widely the Act here departs from the analogy of previous Taxing Acts, and how impossible it is to construe the Act with reference to them. Clause (*b*) is that with which we are directly concerned. It includes "Property in which the deceased or any other person had an interest ceasing on the death of the deceased." This would include a life interest of the deceased, even though he might have assigned or mortgaged it to any other person, or even a life interest in which he never had a

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beneficial right, as in the case of an estate for his life originally limited to another person.

It is evident, however, that to levy the duty on property ceasing on the death might, in some cases, involve a purely arbitrary standard, departing altogether from the test of passing at the death of the deceased involved in the general scheme. For instance, to mention one case only, a pension to a retired civil or military servant of the Crown would in general cease on his death, but there would be no passing of it: it would absolutely determine. It was necessary, therefore, to qualify the general words "ceasing on the death of the deceased," and that is done by the following words: "To the extent to which a benefit accrues or arises by the cesser of such interest." These words may at first sight seem to involve a departure from the principle that the Act takes no notice of successions, but that is not so. The words only limit the operation of the word "ceasing" by confining it to cases where something passes, and to the extent to which anything does pass. They in no sense make the duty a duty on the succession. The subsequent words of the sub-section deal with, and except, cases in which there is in a sense something passing, though not in the sense in which "passing" is intended to be used in the Act.

Pausing here, there can be no doubt that on the ceasing of the second Earl Cowley's life interest on his death estate duty became leviable. How that duty had to be estimated is dealt with later on in s. 7, sub-s. 7, of the Act. Sub-s. 7 is that part of the section which deals with the particular case of an interest ceasing on the death. It provides in terms for the ascertainment of the value of the benefit accruing or arising from the cesser of an interest on the death of the deceased, and these words, at first sight, seem again to indicate a departure from the general scheme of valuing the property passing, by substituting for it a valuation of the succession. But this is explained by the way in which the corresponding words are used in s. 2, sub-s. 1 (*b*). They are there used, as before pointed out, as a measure of the extent to which the property in which the interest ceases is to be deemed to pass, and s. 7,

sub-s. 7, only shews the way of applying that measure. The value is to be ascertained in alternative cases (*a*) and (*b*) as follows: "Shall (*a*), if the interest extended to the whole income of the property, be the principal value of that property; and (*b*), if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended." In each of these alternative clauses the interest dealt with is clearly the interest which ceases, and not the interest which the deceased enjoyed, or the interest taken. The second Earl Cowley's interest in the settled property did not extend to the whole income, being subject to the overriding annuities of 1000*l.* and 500*l.* and yearly payment of 40*l.* 10*s.*, subsisting under or by virtue of Lord Mornington's will. The case, therefore, falls under the alternative (*b*), and the value is to be the principal value of an addition to the property equal to the income to which his interest extended. The language is somewhat peculiar and requires careful consideration. The key to its meaning is to be found by bearing in mind the general scheme of the Act. The duty is to be levied on the principal value of the property passing. What passes must be ascertained at the moment of passing without reference to any events happening before or afterwards. The income passing will, as in other cases, fix according to the nature of the property the amount of principal value. We find then that the income to which the interest extended is taken as the measure for the purpose of the calculation, and it is treated as though it were income of an addition to the property being dealt with, in order to determine the correct mode in which the principal value is to be arrived at.

In the case before us no question has been raised as to the way in which the deductions made in respect of the overriding charges have been arrived at, but lest it should be treated as a precedent, I feel bound to observe upon it. The principal value for the purposes of the Act has been determined by taking the whole principal value of the settled property, and deducting therefrom the capitalized value of the overriding charges. This is not the method prescribed by the Act, though

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in the particular case the numerical value is not far off from that which would result from applying the rule of sub-s. 7 (*b*). In other cases the result obtained would be widely different from that intended by the Act. Take, for instance, the not uncommon case of an overriding term of twenty-one years from the death of a testator held on trust for raising a fund for payment of his debts or for portions. If the whole income of the settled property were 1000*l.* a year, and 900*l.* had to be raised during the term for the purposes of it, the income to which the life tenant's interest extended would be 100*l.* only, and the principal value of an addition to the settled property producing 100*l.* a year would be in that case one-tenth of the principal value of the whole property arrived at in the way prescribed for property of that kind. But it might happen that the term of twenty-one years would expire by effluxion of time on the day after the death of the life tenant. The value of the charge under the term would then be next to nothing, and deducting its value from the principal value of the whole property would lead to a totally wrong result.

Subject to what has been before pointed out as to the inaccurate mode of dealing with the overriding charges, which in my judgment, if it be worth while, ought to be corrected, the deductions as to those items are right. The case as to the 230,000*l.* debt may be summed up by saying that its existence in no way affected the interest passing at the second Earl's death, but only the extent of his enjoyment of that interest, which is irrelevant. The debt, therefore, ought not to be deducted; and the same line of reasoning would shew that the alternative claim for a deduction of that part of the 230,000*l.* which was paid to or for the benefit of the second Earl must equally be rejected.

But then it was argued before us that the 230,000*l.* is to be allowed as a deduction under s. 7, sub-s. 1, and the learned judges in the Court below seem to have held that the deductions provided for by s. 7, sub-s. 1, ought to be allowed in cases within sub-s. 7 (*a*), but not in cases within sub-s. 7 (*b*). This construction would lead to very extraordinary results, and I see no reason why if the deductions are permissible in the one case

they can be excluded in the other. But when it is once established that the valuation in sub-s. 7 when fully carried out is a valuation, not of the interest of the person who takes or even of the deceased, but of the property passing, it follows that no incumbrances created by the deceased on his interest, or by the person taking on the interest which he takes, can be brought into account; and having regard to this I see no ground on which any of the deductions provided for in s. 7, sub-s. 1, should be allowed at all. Whatever deductions are provided for in that sub-section are deductions from an "estate," which is the word used in the Act to denote an aggregate of property passing—not a particular property passing. Next, the estate is to be one from which funeral expenses and general debts of the deceased may properly be deducted. Thirdly, the debts and incumbrances to be deducted are to be deducted from the land or other subjects of property liable thereto. It seems impossible to hold that the funeral expenses of the deceased can in any case be payable out of property his interest in which, if he ever had one, has ceased, and debts of his which are not incumbrances are in the same position as funeral expenses. It seems equally impossible to point out any land, or subject of property, out of which any incumbrances of the second Earl are now payable, other than assets of his which by law are made subject to debts.

I do not think it necessary to discuss in the present case the limitations contained in clauses (*a*) and (*b*) of s. 7, sub-s. 1, though probably they would be found to involve further objections to the claim now made by the petition. The learned judges were of opinion that a mortgage debt on the life estate only could not be deducted out of property when the life interest ceased, and no doubt this is so; but I see no ground for treating differently a mortgage debt which is only a continuing incumbrance because the owner of the reversion has made it a charge on his reversion. It is not a continuing incumbrance on any property of the owner of the life estate. Different considerations might apply to the case of an incumbrance which the two combined to create on the corpus of the property; but, as before shewn, that does not arise here. I think that the Attorney-

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Rigby L.J.

General was right in saying that for the purposes of this case the mortgage of the life estate and of the reversion might just as well have been made by separate deeds. The annuities, amounting to 3000*l.*, affected only the enjoyment by the second Earl of the property which passed, not the extent of the property passing, and cannot therefore be deducted.

The appeal of the Crown must be allowed, and the cross-appeal dismissed.

COLLINS L.J. I agree with the judgments which have been delivered; but as we are differing from the Court below, I will add a few words.

The question is, Had the second Earl Cowley while he lived, or had any other person, an interest which ceased at his death in any property? If so, such property is deemed to have passed on his death "to the extent to which a benefit accrues or arises by the cesser of such interest" (s. 2, sub-s. 1 (*b*)). I am of opinion that the mortgage of his life interest in the trust property, which was given by the second Earl Cowley to the London Assurance Corporation, to secure in all 140,000*l.*, and afterwards assigned by them to the Prudential Assurance Company under the fresh arrangement made by the second Earl and the present Earl with that company, whereby it was provided that it should be a collateral security for the whole amount advanced by them, was a subsisting interest in the hands of the latter company which ceased upon the death of the second Earl; and the property embraced in that security must, therefore, be deemed to have passed upon his death. This follows from the fact that that mortgage was expressly kept alive by a proviso in the later mortgage by the second and third Earl to the Prudential Company, and it is therefore unnecessary to express any opinion upon the point, so ably argued by Mr. Haldane, as to what would have been the effect of the new arrangement but for this proviso, in working a merger of the life estate, and so preventing the cesser of any interest on the death of the second Earl. But it is still necessary to put a meaning on the words "to the extent to which a benefit accrues or arises by the cesser of such interest," for to such extent only the property is deemed

to pass. For this we must look to s. 7, sub-s. 7 (*a*) and (*b*). It is clear that the case does not fall within (*a*), as the charges allowed by the Crown never formed part of the life estate of the second Earl, and no interest therein ceased on his death. We must, therefore, look to sub-s. (*b*) for the measure of the benefit in this case, since it is manifest that the interest which ceased extended to less than the whole income of the property. The value of the benefit, therefore, will be, according to the section, "the principal value of an addition to the property equal to the income to which the interest extended." Why this cumbrous mode of expression was adopted I am at a loss to understand, if it is to be taken to mean what I suppose it was intended to mean, namely, as the Court below thought, that just as in case (*a*), where the interest extended to the whole income, you take the principal value of the property, i.e., so many years' purchase of the income, so where it extends to part only of the income, you take the principal value, i.e., so many years' purchase of that part of the income. Why, having ascertained the amount of the income to which the interest extended, you should be invited to capitalize, not it, but "an addition to the property" equal to it, I cannot pretend to surmise, nor were counsel able to remove my difficulty; but it seems quite clear that the section cannot be construed so as to found a claim to deduct the mortgage debt. The life estate of the second Earl, and the mortgage debt as a charge thereon, came to an end at one and the same time, and the value of the property in which the interest ceased on his death, and the value of the benefit accruing on such cesser, were therefore wholly unaffected by the existence of the mortgage.

This train of reasoning is precisely that of the Court below, but I think they have ignored the effect of the proviso which kept alive the pre-existing mortgage on the life estate for 140,000*l.*, and further constituted it a collateral security for the whole sum, 230,000*l.* in all, advanced by the Prudential Company. And it is the existence of this mortgage so kept alive, and determining, so far as it was a charge on the life estate, on the death of the second Earl Cowley, that is decisive in favour of the Crown in this case.

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Collins L.J.

It only remains to consider whether s. 7, sub-s. 1 (*a*), has any bearing on the case. This section provides that in determining the value of an estate for the purpose of estate duty allowance shall be made for reasonable funeral expenses and for debts and incumbrances; but an allowance shall not be made "for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created bonâ fide for full consideration in money or money's worth wholly for the deceased's own use and benefit, and take effect out of his interest." These words, if read without qualification, are perhaps wide enough to cover this case. The debt secured by the mortgage on the life estate was incurred bonâ fide for full consideration in money, wholly for the deceased's own use and benefit, and takes effect out of his interest. Clauses (*b*) and (*c*) do not apply, and the final words of the section would not seem necessarily to exclude it. They are: "any debt or incumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property liable thereto," which in this case was the property in which the life interest subsisted. I think, however, the section must mean liable at the time when the deduction is to be made, and must be taken to apply only to deductions from estates which actually pass, and which form assets for the payment of the deceased's debts, which is not the case here. I think, therefore, the Court below were perfectly right in holding that this section did not apply to this case.

The claim to deduct the value of the 3000*l.* annuity fails for the same reasons as the claim to deduct the mortgage debt. The annuity which dropped on the death of the second Earl did not affect the value of the property upon which it was charged, and which was deemed to pass upon his death. The judgment, therefore, must be reversed and the cross-appeal dismissed.

*Judgment varied.*

Solicitors for petitioner: *Collyer-Bristow, Russell, Hill & Co.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

A. M.

[IN THE COURT OF APPEAL.]

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1898
*Jan.* 21.

## *In re* A BANKRUPTCY NOTICE.

*Bankruptcy—Bankruptcy Notice—Scottish Judgment registered in England—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Judgments Extension Act*, 1868 (31 & 32 *Vict. c.* 54), *ss.* 3, 4.

A judgment of the Court of Session in Scotland registered in England under the Judgments Extension Act, 1868, cannot be made the foundation of a bankruptcy notice.

*In re Watson*, [1893] 1 Q. B. 21, followed.

APPEAL against the refusal by a registrar in bankruptcy to issue a bankruptcy notice.

The appellant had obtained a decreet in the Court of Session in Scotland against the debtor for the payment of a sum of money, and had registered a certificate of an extract thereof in the High Court in England under the Judgments Extension Act, 1868. He then applied to issue a bankruptcy notice against the debtor founded on the above-mentioned judgment. The registrar refused the application.

*F. Cooper Willis*, and *C. Tindale Davis*, for the appellant. It is not denied that "final judgment" in sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, means final judgment in an English court; but s. 3 of the Judgments Extension Act, 1868, provides that the certificate of an extract of a decreet of the Court of Session in Scotland, when registered under the Act, shall have the same force and effect as a judgment of the Court in which it is so registered, and that all proceedings may be had and taken on such certificate as if the decreet of which it is a certificate had been a judgment originally obtained in the court in which it is so registered. It is true that in the case of *In re Watson* (1) the Court of Appeal appears to have held that the effect of s. 4 of the Judgments Extension Act, 1868, was to limit the effect of s. 3 of that Act, and therefore that the judgment when registered in England is only to have the

(1) [1893] 1 Q. B. 21.

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same force and effect as an English judgment for the purposes of execution upon the judgment; but that view does not seem to be consistent with what was said by the Court of Appeal in the subsequent case of *In re Low*. (1) It is submitted that the object of s. 4 of the Judgments Extension Act, 1868, is not to cut down the natural meaning of the very wide expressions used in s. 3, but merely to give a control to the Court in which the judgment is registered in relation to execution under that Act.

*A. H. Carrington*, for the debtor. The case of *In re Watson* (2) is absolutely conclusive on the point. The proceeding by way of bankruptcy notice is no more "execution" than was the procedure by judgment summons in that case. What the Court of Appeal did in *In re Low* (1) was, as a condition of granting an injunction to restrain the creditor from exercising his legal right of issuing execution on the registered judgment, to impose the term that he should be allowed to prove in respect of the Scottish judgment in the administration action going on in England. The case is merely an example of the well-known rule that he who seeks equity must do what is equitable: and there is nothing in the case inconsistent with the decision in *In re Watson*. (2)

[He was stopped by the Court.]

A. L. SMITH L.J. The question in this case is whether the registrar was right in refusing to issue a bankruptcy notice. The creditor, having obtained a judgment in Scotland for payment of a debt, procured it to be registered in England under the Judgments Extension Act, 1868, and now seeks to make that judgment the foundation of a bankruptcy notice for the purpose of making the debtor bankrupt in England. The case appears to me to be concluded by the decision of this Court in *In re Watson* (2), which, in my opinion, was rightly decided. The Bankruptcy Act, 1883, does not apply to Scotland, and the final judgment mentioned in s. 4, sub-s. 1 (*g*), of the Act obviously means a final judgment obtained within the jurisdiction to which the Act is confined—that is to say, in

(1) [1894] 1 Ch. 147. (2) [1893] 1 Q. B. 21.

England. Therefore, if the case had to be dealt with on that Act standing alone, it is clear that the provisions of s. 4, sub-s. 1 (*g*), would not apply. But the appellant relies on the provisions of s. 3 of the Judgments Extension Act, 1868. That section provides that, where a decreet for payment of a debt or damages has been obtained in the Court of Session in Scotland, a certificate of an extract thereof registered in the Court of Common Pleas at Westminster or the Court of Common Pleas at Dublin shall have the same force and effect as a judgment obtained or entered up in the court in which it is so registered. But s. 4 of the same Act provides that "the Courts of Common Pleas at Westminster and at Dublin and the Court of Session in Scotland shall have and exercise the same control and jurisdiction over any judgment or decreet, and over any certificate of such judgment or decreet, registered under this Act in such courts respectively, as they now have and exercise over any judgment or decreet in their own courts, but in so far only as relates to execution under this Act." It was held in *In re Watson* (1) that the effect of that section was to limit the operation of s. 3 to execution upon the judgments registered under it. It is clear that the present application does not relate to execution upon the judgment. For these reasons I think that the appeal must be dismissed.

CHITTY L.J. I agree. If the case depended solely upon the Bankruptcy Act, 1883, the decision of the registrar would clearly be right. The final judgment contemplated by s. 4, sub-s. 1 (*g*), of that Act means primâ facie a final judgment of a Court having jurisdiction in England. That being so, the counsel for the appellant endeavoured to support his appeal by reference to the provisions of s. 3 of the Judgments Extension Act, 1868. In the absence of authority on the subject, it might have been competent to us to decide that the effect of s. 4 of that Act is not to limit the operation of s. 3, but merely to provide for the control over registered judgments in so far only as relates to execution under the Act; but it appears to me that the question is no longer open in this Court, and that

(1) [1893] 1 Q. B. 21.

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Chitty L.J.

*In re Watson* (1) has already decided that the effect of s. 4 is to limit the operation of s. 3 to execution upon the judgments registered under that section. The issuing of a bankruptcy notice is clearly not a process of execution upon the judgment. Therefore the case comes exactly within the authority of *In re Watson.* (1)

The case of *In re Low* (2) does not appear to me to be inconsistent with *In re Watson.* (1) In the case of *In re Low* (2) there was an administration action, and a creditor, who had obtained a judgment in Scotland which he had registered in England under the Judgments Extension Act, 1868, proposed to issue execution under that Act. North J., on an application for an injunction by the administratrix, restrained him from doing so on the ground that, the Court having taken upon itself the administration of the assets, the creditor could not be allowed to enforce his judgment against them. The learned judge granted the injunction restraining the creditor from issuing execution without imposing any terms on the administratrix, thereby depriving the creditor of his legal right. The Court of Appeal held that that was not the right order to make, for, if the creditor was to be deprived of his legal right to issue execution, it ought to be upon equitable terms, and he should be allowed to prove for the amount of the judgment in the administration action. It was therefore merely a case of a court of equity imposing equitable terms when asked to grant an injunction. I do not see that there is any direct conflict between that case and *In re Watson.* (1) The latter case was not cited in *In re Low* (2), nor was s. 4 of the Judgments Extension Act, 1868, alluded to; and the Court of Appeal do not seem to have assumed in any way to overrule the decision in *In re Watson.* (1)

COLLINS L.J. I am of the same opinion. If it had not been for the decision in *In re Watson* (1), I should have desired to hear further argument in this case. But in that case the Court of Appeal appears to me to have construed the Judgments Extension Act, 1868, as meaning that judgments regis-

(1) [1893] 1 Q. B. 21. (2) [1894] 1 Ch. 147.

tered in England under that Act are only to have effect there for the purposes of execution. It would be impossible to argue that the issue of a bankruptcy notice is a form of execution; and therefore the result is that the Judgments Extension Act, 1868, does not give the power to issue such a notice, which without it clearly would not exist. I regard this case as concluded by the decision in *In re Watson* (1), by which we are bound, and therefore it is unnecessary to consider the matter any further.

*Appeal dismissed.*

Solicitor for creditor: *G. M. Folkard.*
Solicitors for debtor: *Hicks, Arnold & Mozley.*

E. L.

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*In re* AN ARBITRATION BETWEEN THE LONDON COUNTY COUNCIL AND THE CITY OF LONDON BREWERY COMPANY. 1897 *Nov.* 1, 26.

*Local Government—London County Council—"Betterment"—Initial Valuation—Trade Interest—Tied Public-house—London County Council (Tower Bridge Southern Approach) Act*, 1895 (58 & 59 *Vict. c. cxxx.*).

By the London County Council (Tower Bridge Southern Approach) Act, 1895, provision was made for a charge to be made on lands which would be increased in value by the proposed improvement, and for an initial valuation of such lands. By s. 36, "In making such valuation the valuer shall separately distinguish and assess in each case the value of the land apart from that of any existing buildings thereon, and shall also value the land and buildings as a whole, and shall not take into consideration any increased value accruing or supposed to accrue to such land or buildings from or in consequence of the improvement, but shall only take into consideration the value independently of the improvement, and as if the improvement had not been contemplated. The valuer shall also separately value the interest of the owner of any such lands, and the interest of every lessee of any such lands, for a term having not less than twenty-one years unexpired at the date of the valuation (excluding from each such valuation any trade interest)."

In making an initial valuation of a "tied" public-house:—

*Held*, (1.) That, in valuing the land apart from the buildings thereon, the valuer might not take into consideration either the takings and payments of the public-house, nor the fact that it was "tied."

(2.) That, in valuing the land and buildings as a whole, evidence of the

(1) [1893] 1 Q. B. 21.

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takings and payments should not be admitted even for the purpose of testing the evidence of witnesses, and that on this head the fact that the house was "tied" was immaterial.

(3.) That, in valuing the interests of the owner and lessees, the "tying" covenant must be taken into consideration.

AWARD and valuation stated by an arbitrator in the form of a special case under an order of the Court.

By the London County Council (Tower Bridge Southern Approach) Act, 1895 (58 & 59 Vict. c. cxxx.), power is given to the London County Council to make a new and improved approach to the Tower Bridge on the southern side.

By s. 36, "And whereas the improvement will be effected out of public funds charged over the whole county, and will or may substantially and permanently increase in value lands in the neighbourhood of the improvement which will not be acquired for the purpose thereof, and it is reasonable that provision should be made under which in respect or in consideration of such increased value a charge should be placed on such lands: Therefore the following provisions shall have effect. . . . .

"(2.) All lands within the improvement area, but which shall not be purchased and taken by the council under the powers of this Act, shall be liable to have an improvement charge placed on such lands or some of them (in accordance with the provisions hereinafter set forth) in respect or in consideration of any substantial and permanent increase in value which it is clearly shewn has been derived from the improvement by this Act authorized.

"(3.) At least two months before the council commence any part of the improvement, and as soon after the passing of this Act as the council think fit, the council shall make under their seal a specification of all the lands upon which they propose to place a charge and which they desire to include in the assessment hereafter mentioned.

"They shall give notice by registered letter addressed to each owner, lessee, or occupier of any such lands within the improvement area as the council include in such specification.

"Thereupon any such owner, lessee, or occupier may apply to

the Local Government Board to appoint some independent person to make a valuation of the several lands within the improvement area which the council have included in the specification.

"A copy of the specification shall be delivered to the person so appointed within twenty-one days after his appointment; and the person so appointed shall thereupon, after giving such notice or notices as the Local Government Board may direct, and hearing any parties interested and applying to be heard, proceed to make a valuation of all such lands, which valuation is hereafter referred to as 'the initial valuation.' The proper cost of making the initial valuation including the reasonable costs, charges, and expenses of all or any of the parties interested (to be fixed in case of difference by the Local Government Board), shall be paid by the council.

"Provided that if within one month after the service of the said notice no application be made for the appointment of a person to make the initial valuation, the council shall make such application, and the valuation shall be made accordingly.

"In making such valuation the valuer shall separately distinguish and assess in each case the value of the land apart from that of any existing buildings thereon, and shall also value the land and buildings as a whole, and shall not take into consideration any increased value accruing or supposed to accrue to such land or buildings from or in consequence of the improvement, but shall only take into consideration the value independently of the improvement, and as if the improvement had not been contemplated. The valuer shall also separately value the interest of the owner of any such lands, and the interest of every lessee of any such lands, for a term having not less than twenty-one years unexpired at the date of the valuation (excluding from each such valuation any trade interest), and shall not take into consideration any increased value accruing or supposed to accrue to such lands from or in consequence of the improvement, but shall only take into consideration the value of the said lands independently of the improvement, and as if the improvement had not been contemplated."

Provision is then made for the assessment for the proposed

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charge, and by sub-s. 9, "If (A) any owner or owners of any lands comprised in the initial valuation upon which a charge is proposed to be placed, who alone or together have power to sell the fee simple of such lands subject to any lease or leases thereof, or (B) any such owner or owners of any such lands, and any lessee or lessees of the same for a term having not less than twenty-one years unexpired at the date of the initial valuation, who alone or together have power to surrender his or their lease or leases so that the terms of years thereby created shall merge in the fee simple and inheritance of such lands, are of opinion that such charge is greater than it should be in reference to the enhancement or supposed enhancement of the value of such lands by reason of the improvement, they may at any time within the period of three months . . . . by notice in writing served upon the council, require the council to purchase their estate and interest in such lands; and the council shall thereupon purchase and take the same accordingly at the value specified in the initial valuation."

In accordance with the Act, a specification was duly made, and an arbitrator appointed by the Local Government Board.

Objections of law having been taken by the lessees of the Raven and Sun public-house, No. 52, Tanner Street, Bermondsey, and by the City of London Brewery Company, the freeholders of the Old Rose public-house, No. 44, Tanner Street, as to the meaning of the words "excluding from each such valuation any trade interest," the arbitrator made his award and valuation in alternative form, and left the following questions for the consideration of the Court:—

As to the Old Rose public-house:—

(1.) Whether, according to the true construction of the Act, evidence of the takings and payments of the said public-house was admissible?

(2.) Whether—the Old Rose being let on a lease whereof nineteen years are unexpired, at a rental of 100*l.* per annum, subject to the ordinary covenant tying the purchase of malt liquors to the lessors—in arriving at the value of the lessors' interest the value of such covenant is to be excluded?

As to the Raven and Sun public-house:—

(1.) Whether, according to the true construction of the Act, evidence of the takings and payments of the said public-house was admissible?

(2.) Whether—the Raven and Sun being under lease for an unexpired term exceeding twenty-one years without any tying covenant—in arriving at the value of the lessee's interest, all value due to the capacity to tie must be excluded?

*Bosanquet*, *Q.C.*, and *Cababé*, for the brewery company. It is to the interest of the owners that the initial valuation should be as high as possible. The value of the tied covenant to them is not a trade interest, and ought not to be excluded. The premises have been valued by consent, not as mere land and buildings, but as licensed premises. The tied covenant runs with the land, and must be taken into consideration: *Clegg* v. *Hands*. (1)

The evidence of the takings and payments must be admissible in assessing the value of a public-house. The statement of experts as to the value can only be based on such evidence, and it must be admissible at any rate as a means of testing such statements.

*Alfred Lyttelton*, for the London County Council. The tied covenant is a trade interest, and cannot, therefore, be taken into consideration: *Allison* v. *Monkwearmouth Overseers* (2); *Sunderland Overseers* v. *Sunderland Union*. (3)

It is settled law that evidence of payments and takings cannot be taken into consideration in making such a valuation: *Dodds* v. *South Shields Assessment Committee*. (4)

*Bosanquet*, *Q.C.*, replied.

*Cur. adv. vult.*

Nov. 26. The judgment of the Court (Kennedy and Wright JJ.) was read by

WRIGHT J. By an Act passed in 1895 (58 & 59 Vict. c. cxxx.) the London County Council were empowered to make certain street improvements. Sect. 36 of the Act recites that,

(1) (1890) 44 Ch. D. 503.
(2) (1854) 4 E. & B. 13; 23 L. J. (M.C.) 177.
(3) (1865) 34 L. J. (M.C.) 121.
(4) [1895] 2 Q. B. 133.

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"whereas the improvement will be effected out of public funds charged over the whole county, and will or may substantially and permanently increase in value lands in the neighbourhood of the improvement which will not be acquired for the purpose thereof, and it is reasonable that provision should be made under which, in respect or in consideration of such increased value, a charge should be placed on such lands"; and it proceeds to make provision for the ascertainment of the area which will receive permanent benefit from the improvement and for the estimation of the increased value which will accrue to each separate property in that area, and for the assessment on the several properties of an annual charge representing such increase of value. The provisions for these purposes comprise four distinct operations. The council (sub-s. 3) are to make a specification of the properties which in their judgment will be so increased in value. Then (sub-s. 3) a valuer appointed by the Local Government Board is to make an "initial valuation" of each property after hearing interested parties. Then (sub-s. 4) the council are to make an assessment shewing in the case of each property the amount of enhancement of its market value which in the judgment of the council will accrue from the improvement, and the amount of redeemable annual charge which is to be imposed in respect thereof (being about 1½ per cent. on the estimated enhancement). Lastly, an arbitrator appointed by the Local Government Board is to determine any objections to any of the above-mentioned matters, and also the incidence of the charge as between the parties having various interests in any property. Among the provisions relating to the assessment of enhancement of value is one (sub-s. 9) providing that the owner of any property assessed may, alone or in concurrence with termors for twenty-one years unexpired, if dissatisfied with the assessment, require the council to purchase his estate and interest in the property at the value specified in the "initial valuation," and thereupon the council must either purchase as required or abandon the proposed charge on the property. The questions for decision in the present case arise in relation, not to the specification or the assessment by the council or to the final

arbitration, but solely to the "initial valuation" of the properties. In making that valuation the valuer is, firstly, to "distinguish and assess" the value of the site apart from that of any existing building thereon. He is, secondly, to "value" the site and buildings as a whole without reference to the intended improvement. He is, thirdly, to separately "value" "the interest" of the owner of the site and buildings and "the interest" of any lessee thereof for twenty-one years unexpired (excluding from each such valuation any "trade interest," which expression we understand to refer to goodwill, expectation of profit, and any other similar matters, and to estimates based on takings and payments), and in doing so he "shall only take into consideration the value of the said lands independently of the improvement and as if the improvement had not been contemplated." In the case of the Old Rose the premises are used as a public-house. There is not a lessee for twenty-one years, but there is a shorter lease with the common "tying" covenant. In valuing the site apart from the buildings on it the valuer has, with the assent of the county council, taken into consideration the fact that the premises are licensed as a public-house, and no question arises on that point, though it would seem that this fact, if admissible at all as an element of value in the first or second parts of the valuation, should be considered as an element of value of the site and buildings rather than of the site alone. On that basis he has made alternative valuations of the site, dependent on the two questions whether the takings and payments of the public-house and the fact that it is "tied" are elements of the value of the site or of the site and buildings. It seems to us plain that neither of them can be considered in valuing the site "apart from any existing buildings thereon."

In the next part of the valuation—namely, that of the site and buildings "as a whole"—the same two questions arise. As regards the takings and payments, we think that these cannot be treated as elements of value of the land and building—i.e., as in themselves evidence of value—and that evidence of them should not be admitted even for the purpose of testing the evidence of witnesses. In *Dodds* v. *South Shields*

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*Assessment Committee* (1) it was so held with reference to questions of rating, and we think that the principle of that decision, although partly based on practice, is applicable to the present case. The admission of such evidence must tend to induce a consideration of trade value instead of the market value of the land and buildings. As regards the "tying" covenant, we think that the valuation of the site and buildings must in effect be the same as if that covenant were considered. The real question is, as it seems to us, what is the market value of the premises fit for a public-house, and considered apart from any particular distribution of the interests in it —i.e., considered as an unqualified freehold? If indeed the owner held subject to a covenant not to use the premises as a public-house, a different question would arise. But, as things are, the property must be valued as that of a person who is in all respects a beneficial owner. The fact that the house is tied has not increased its value, but only amounts to this—that the owner has not parted with that part of its value which consists of the power to tie. The value of the premises is presumably the same either way. If the owner chooses to tie he may get less rent, but more benefit in other ways. If he does not tie he may get more rent, but less of the other benefits. The enhancement of the value of the premises which will result from the improvement will be the same whether the premises are tied or not, though the benefit of it may be differently apportioned between lessor and lessee; and the charge is intended to be proportioned to the total enhancement of value.

The third part of the valuation appears to be introduced for the purposes of sub-s. 9, and although it seems primâ facie to be required only when there is a lessee for at least twenty-one years, yet in order to give full effect to sub-s. 9 it seems necessary to construe the provision for this third part of the valuation as requiring in every case a valuation of the owner's interest. The only alternative would be to treat the owner as interested to the extent of the whole valuation. This would not work any injustice apart from sub-s. 9, because the

(1) [1895] 2 Q. B. 133.

incidence of the charge will be apportioned by the arbitrator under sub-s. 17; but it would work grave injustice under sub-s. 9, because the council would be compelled either to pay for much more than what the owner's real interest might be, or to abandon the charge altogether. Then it only remains to determine whether in the present case the fact that the house is "tied" ought to be considered in this third part of the valuation. We think that it ought, in the same manner as in the valuation of the site and buildings, though not for the same reasons. This part of the valuation is a valuation not of the site and buildings, but of the owner's interest in them, and anything (not being a "trade interest") ought to be considered which affects the quantum of that interest. It is not so much that the covenant is to be valued as that the owner's interest has not been diminished by alienation of the power to tie. If he had leased the house without tying it his interest would have been less, unless he got a compensating rent. The effect, as we understand the matter, will be that if the owner requires the council under sub-s. 9 to take his interest, and they do not abandon the charge on his property, they will have to pay him the value of his actual interest in the premises, and the charge will continue and be apportioned between the council and the lessees, just as if the council had always been the owner and as if the existing leases had been held from them.

We have so far dealt with the case of the premises described as the "Old Rose." In the case of the "Raven and Sun" similar questions arise with this exception—that the premises are under lease for an unexpired term exceeding twenty-one years without any "tying" covenant. This circumstance will not, in our opinion, of itself affect the first or second part of the valuation, though it may or may not be material to be considered as tending to shew that the rent is or is not a fair criterion of value. But it may be material in the third part of the valuation. If the owner gets a rent different from the rent which he could get if the house were tied, and if that difference fairly represents the value to the lessee of his freedom from such a covenant, then the existence or non-existence of such a covenant would seem to be immaterial, but otherwise the value

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of the interest of one or other party would be increased or diminished as the case may be. The valuation will therefore stand as a valuation according to the last tables in each case.

Solicitors for brewery company: *Weston & Sons.*
Solicitor for London County Council: *W. A. Blaxland.*

A. P. P. K.

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1897 *Nov.* 19;
1898 *Jan.* 22.

## MARKS *v.* FROGLEY AND OTHERS.

*Volunteer—"Subject to Military Law"—"When being Trained or Exercised with Regular Forces"—Returning from Training—Assault and False Imprisonment—Obedience to Order of Superior Officer—Army Act*, 1881 (44 & 45 *Vict. c.* 58), *ss.* 41, 45, 158, 176.

The plaintiff, who was a member of a volunteer corps, while being trained with a portion of the regular forces, was charged with larceny from a comrade. The period of training being just at an end, the adjutant ordered him to be arrested and taken in military custody by a sergeant and two privates of his corps to his place of residence, which was in another county, and there handed over to the civil authority. This was done, and he was subsequently tried and acquitted of the charge.

In an action against the sergeant and privates for assault and fals imprisonment:—

*Held*, that the subjection of the plaintiff and defendants to military law determined with the cessation of the period of training, and did not continue until the corps reached its destination and was formally dismissed; and that the action of the defendants in taking the plaintiff in custody into another county could not, therefore, be justified either under the provisions of the Army Act, 1881, or as the act of soldiers obeying the orders of a superior officer.

FURTHER CONSIDERATION before Kennedy J.

The action was brought by the plaintiff, who was a private in the second volunteer battalion of the Bedfordshire Regiment, against Superintendent Frogley of the Herts county police, Arthur Cooper, a sergeant, and Thomas Lovelock and George Albert Short, privates in the plaintiff's regiment, claiming damages for assault and false imprisonment. At the trial, which took place before Kennedy J. and a special jury, Frogley obtained a judgment in his favour; but the jury assessed the damages against the other three defendants at 300*l.*, and the

judge reserved the question of their liability in law for further consideration.

The following statement of the relevant facts is taken from the judgment of Kennedy J.:—

"The plaintiff and these three defendants, with other members of the volunteer corps to which they all belonged, were in August last in military training with a portion of the regular forces at Shorncliffe. The camp was broken up on the morning of August 8. Early on that morning, and whilst the preparations for the return of the volunteers to their respective homes were proceeding in the camp, a disturbance took place in and around the tent in which the plaintiff and others had been lodged in consequence of some of the plaintiff's comrades accusing him of having stolen and hidden in his kit-bag a number of articles which belonged to them. Captain Foote, the adjutant of the corps, having been informed as to the disturbance, came to the spot, and ultimately ordered Sergeant Killen to form an escort and take the plaintiff to the guard tent, where he would find Lieutenant Roberts on the point of proceeding with the baggage and its escort to Shorncliffe Railway Station. Sergeant Killen was to direct Lieutenant Roberts to take the plaintiff with the baggage guard to the railway station, and there keep him until the D (plaintiff's) company arrived. By the further orders of Captain Foote, conveyed through Sergeant Killen, the plaintiff, after his arrival at the railway station, was to be taken in military custody in the special military train, which was then about to start for the conveyance of volunteers to Watford, Boxmoor, and other stations of the district to which the plaintiff and other members of his volunteer corps belonged; and on his arrival at Boxmoor (the railway station about two miles distant from Hemel Hempstead, where the plaintiff lived) the plaintiff was to be taken by his escort to the police station at Hemel Hempstead, and there handed over to the civil authority. Captain Foote at the same time directed that information as to what had happened should be given at Hemel Hempstead to Captain Smeaton, the officer in command of the plaintiff's company. These orders were carried out. After the plaintiff had reached Shorncliffe Station with the

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baggage guard under Lieutenant Roberts, and the train was ready to receive her passengers, the defendant Cooper selected, in the usual way, from the ranks of the volunteers who were drawn up in the railway station, his two co-defendants Lovelock and Short to form the prisoner's escort on the journey to Boxmoor and Hemel Hempstead. The plaintiff was then placed in a compartment with these defendants, and the four so travelled together in the train to Boxmoor (a journey of some three and a half hours). On the arrival of the train at Boxmoor, the prisoner, under the charge of his escort, was directed by the defendant Cooper to remain in a waiting-room while the rest of the volunteers, other than certain persons who would be required as witnesses in the plaintiff's case, were formally dismissed. The defendant Cooper directed Corporal Young to keep these witnesses together, and with them to follow the prisoner's escort to the police station at Hemel Hempstead. The defendants then marched with the plaintiff, who was placed between the two privates, to the police station, and there charged him before the defendant Frogley with the offence of larceny. After inquiry, and after hearing the evidence of some witnesses, the defendant Frogley took the plaintiff into custody. As there is now no question affecting this defendant, it is unnecessary further to pursue the history of the case except to say, in justice to the plaintiff, that when put on his trial, as he afterwards was, at the quarter sessions at Canterbury, he was honourably acquitted of the charges made against him."

Nov. 19. *Tassell*, for the plaintiff. The plaintiff and the defendants ceased to be under military law when the camp at Shorncliffe was broken up. There is no power under the Army Act, 1881, for an officer to order a man not under military law to be taken in military custody and handed over to the civil authority. The defendants first came upon the scene at the Shorncliffe Railway Station, when they and the plaintiff were no longer under military law. Their arrest of the plaintiff there, and their subsequent conduct to him, cannot, therefore, be justified under the Army Act, 1881, but the case must be treated as if plaintiff and defendants were ordinary civilians.

*R. D. Muir* (*Lawson Walton, Q.C.*, with him), for the defendants. Both plaintiff and defendants were under military law until the battalion was formally dismissed at Boxmoor. By s. 176 of the Army Act, 1881, all men belonging to the volunteer forces of the United Kingdom are persons subject to military law when they are being trained or exercised with any portion of the regular forces. This must include the proceeding to and returning from such training. Even if it be said that they were not then on actual military service, they were subject to the discipline provided by the Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 21, and were not, therefore, mere civilians.

But if they ceased to be subject to military law after they left the camp at Shorncliffe, their conduct can nevertheless be justified under the Army Act, 1881. At the time of the alleged offence the plaintiff was undoubtedly subject to military law, and his arrest can, therefore, be justified under ss. 41 and 45, and by s. 158 where a person who was arrested while subject to military law has ceased to be so subject, he may be tried and punished in like manner as if he were still so subject. The plain object of that section is to cover cases similar to the present; and it is clear from the last paragraph of sub-s. 1 of s. 158 that a taking into military custody for the purpose of a trial by a civil court is within its purview.

But even if these defences fail, the defendants are exonerated on the ground that at the time the order was given they were acting as soldiers, and were bound to obey the order of their superior officer—at any rate, so long as that order was not obviously illegal. It cannot be contended that Captain Foote's order was obviously illegal. In *Keighly* v. *Bell* (1) Willes J. expressed the opinion that a soldier acting under the orders of his superior—not being necessarily or manifestly illegal—would be justified by his orders; and in *Dawkins* v. *Lord Rokeby* (2) the same learned judge makes similar observations. In *Reg.* v. *Trainer* (3) it was held that railway servants obeying the regulations of the company which were not obviously illegal were

(1) (1866) 4 F. & F. 763. (2) (1866) 4 F. & F. 806.
(3) (1864) 4 F. & F. 105.

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not criminally responsible for an accident which resulted from such obedience. In *Dawkins* v. *Lord Paulet* (1) Cockburn C.J. says (2): "I fully agree that acts done in the honest exercise of military authority are entirely privileged"; and it was there held that no action would lie against a military officer for an act done in the ordinary course of his duty as such officer, even if such act were done maliciously. [He also referred to *Reg.* v. *Hutchinson.* (3)]

*Tassell* replied.

*Cur. adv. vult.*

Jan. 22. KENNEDY J. read the following judgment:—Henry Marks, the plaintiff in this action, who is a member of a Bedfordshire volunteer corps, has obtained, in an action for assault and false imprisonment which was tried before me sitting with a special jury, a finding of the jury of 300*l.* damages against three defendants, Arthur Cooper, who is a sergeant, and Thomas Lovelock and George Albert Short, who are privates in the same corps as that to which the plaintiff belongs. A fourth defendant in the action, Frederic Frogley, who is a superintendent of the Herts county police, has had upon the findings of the jury a judgment in his favour, and no question arises as to his case. The points affecting the three first-named defendants, which I reserved after argument for consideration, are of a somewhat peculiar nature. [The learned judge then stated the facts above set out, and continued:—]

Upon these facts the plaintiff's case against these three defendants, Cooper, Lovelock, and Short, is a case of assault and false imprisonment, based upon the treatment to which they subjected him by keeping him in detention as above stated from the time when they took him in charge at Shorncliffe Station to the time when they gave him in charge to Frogley at Hemel Hempstead. It would be foreign to my present purpose in this judgment to refer to circumstances alleged on the one side or the other in aggravation or in mitigation of damages. It was not pleaded or contended on behalf of the defendants in answer to the plaintiff's claim that a felony had been

(1) (1869) L. R. 5 Q. B. 94. (2) L. R. 5 Q. B. 94, at p. 102.
(3) (1864) 9 Cox, C. C. 555.

committed. Therefore, if the matter had been one touching ordinary civilians, the action was, except as to damages, an undefended action. These defendants, however, contended that this was not a case touching ordinary civilians, but a case in which they (and the plaintiff also) ought to be treated as persons under military law; that the order of Captain Foote was, under that law, justifiable; and that even if it were in any respect illegal, it was not obviously illegal; and that as they simply obeyed an order which they were bound to obey, they were in no case responsible.

There being as regards these defendants only these defences of law, and the facts on which they were based not being in dispute, the only question I had to ask the jury in regard to the action against these defendants was as to the amount of damages to be awarded to the plaintiff in the event of the defence in point of law being held to be bad. The jury assessed these damages at 300*l*. Having had, as I desire to say, very valuable assistance from the learned counsel who argued the case before me, I have now to decide whether the defendants are entitled to succeed upon any of the points of law which they have put forward. I have come to the conclusion that they are not.

In the first place, at the time of the acts of which the plaintiff complains (i.e., during the conveyance of the plaintiff in custody from Shorncliffe to Boxmoor Railway Station and thence to Hemel Hempstead Police Station) I do not think that either the plaintiff or the defendants were subject to military law. This matter depends upon the provisions of the Army Act, 1881. The most important of these is s. 176. That section commences by enacting: "The persons in this section mentioned are persons subject to military law as soldiers, and this Act shall apply accordingly to all the persons so specified." The statute then enumerates in seven sub-sections, which have no bearing upon the present case, various classes of persons, and in the 8th sub-section it proceeds to include "all non-commissioned officers and men belonging to the volunteer forces of the United Kingdom: (*a*) when they are being trained or exercised with any portion of the regular forces, or with any

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portion of the militia when subject to military law; and, (*b*) when they are attached to or otherwise acting as part of or with any regular forces."

Now, there is no question that whilst in the camp at Shorncliffe, and, in my view, until the dispatch of the plaintiff as a prisoner in fact (although he states that he was unaware of it), from Shorncliffe Railway Station, both plaintiff and defendants were volunteers who were being trained and exercised with a portion of the regular forces, and were therefore according to this enactment persons subject to military law. Captain Foote in his evidence deposed to his opinion (and this is the contention of the defendants' counsel) that the training or exercise mentioned in the section ought to be held to continue in regard to each volunteer after the camp was broken up by the departure of the volunteers until the moment of his formal dismissal at his home destination. This, in the case of the Hemel Hempstead party, would be such a point either at Boxmoor Station or after leaving Boxmoor Station as the officer in command of the party might choose for the dismissal of the men. Indeed, I understood Captain Foote to go so far as to say that in his opinion, if one of the volunteers had stolen a sheep on his way home between Boxmoor and Hemel Hempstead, he could have been tried by court-martial for the offence.

I cannot so construe the statute. The words in question appear to me to have a plain and sensible meaning, and to confine the subjection of the volunteer to military law within the period of his being trained and exercised with any portion of the regular forces, or of the militia when subject to military law. The interpretation of Captain Foote and of the defendants' counsel would add to the sub-section the words, "and when they are proceeding to or from such training or exercise." I hold that upon the departure of the plaintiff and defendants from the camp they ceased to be subject to military law—their status ceased to be that of soldiers, and became that of civilians subject only as to discipline to the provisions of the Volunteer Act, 1863, and subsequent statutes relating to volunteers, under none of which could the defendants justify their treatment of the plaintiff.

It is, however, contended by the defendants that even if this be the true view, and they and the plaintiff ceased to be subject to military law after leaving the camp at Shorncliffe, they are entitled to immunity by the combined effect of ss. 41, 45, and 158 of the Army Act, 1881.

I think this defence fails also. There is no doubt that the charge of larceny committed during his training with the regulars in the camp was an offence for which the plaintiff might have been tried by court-martial under s. 41. There is no doubt that his arrest by order of Captain Foote, when that charge was preferred against him, was perfectly proper and legal under s. 45, and I am inclined to think that, if after his arrest it had been judged better that, instead of being tried by court-martial, the plaintiff should be handed over to the local police with the view of his being tried by a civil court, the arrest might properly have been continued, provided due diligence was used, until he was so handed over. I understood the plaintiff's counsel to be willing to concede so much. But Captain Foote did not adopt this course. He adopted the course he did (with, no doubt, the best intentions), believing it both lawful and also expedient, in order to prevent the inconvenience which would arise from delaying (as the holding of a court-martial or the sending of the parties concerned to the Hythe Police Court would delay) the breaking up of the camp and the departure of the plaintiff and the witnesses for their homes by the special train which had been ordered for their conveyance from Shorncliffe. But the course which he preferred was one for which I can find no justification in any section of the Army Act. The provisions of s. 158, sub-s. 1, upon which reliance was placed for the defendants, appear to me not to afford any for more than one reason. In the first place, its sanction for taking into and keeping in military custody, and for trying and punishing a person who has been but has ceased to be subject to military law, is, by the opening words of the sub-section, confined to cases in which "an offence under this Act has been committed" by that person. Here, ex concessis, Marks had in fact committed no offence. One might perhaps, I agree, have expected that the sanction would be extended to the case of an offence

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under the Act being alleged to have been committed; but the words as they stand seem plain enough. Even, however, if these words could be interpreted as they must be interpreted in order to avail the defendants, I could find in this section no justification for that which the defendants did under Captain Foote's order, when after they and he had ceased to be subject to military law they kept the plaintiff as a prisoner during a long railway journey and a two miles' march, not in order that he might be tried by a court-martial, but in order that he might be handed over to the police authority, not in the place of the alleged offence, but in a different county from that in which it was alleged that the offence had been committed.

I doubt whether, even if the plaintiff and defendants continued, as Captain Foote thought they did, to be subject to military law, a detention of this kind and for this purpose could be treated as a proper exercise of the powers of military custody given by s. 45 of the Army Act.

The last point taken for the defendants was that, even if the order which they obeyed was unjustifiable or illegal, still it was not obviously unjustifiable or illegal, and the defendants, who were at the time when it was given by Captain Foote subject to military law and bound to obey his orders and simply did what he ordered, ought not to be held liable for what they did.

The principles of law applicable to a case such as the present, I take as they are stated by Willes J. in his judgment in *Keighly* v. *Bell* (1) and in *Dawkins* v. *Lord Rokeby*. (2) In accordance with those principles as I understand them, I should hold this to be a good plea for the defendants if I was of opinion that they and the plaintiff continued subject to military law during the time of the doing of those acts by the defendants of which the plaintiff complains. Even if the order was in excess of the powers as to military custody given by the 45th section, it would be an excess which, in my view, would not be obvious to persons in the position of the defendants. I am, however, for the reasons which I have already stated, of opinion that, at the time of the acts complained of, neither the plaintiff nor the defendants were subject to military law; and therefore,

(1) 4 F. & F. 763, at pp. 790, 805. (2) 4 F. & F. 806, at p. 831.

equally, I think, in accordance with the law as laid down by Willes J. in the cases to which I have referred, I must decide that this defence also fails. I give judgment for the plaintiff for the amount of the damages fixed by the finding of the jury.

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*Judgment for plaintiffs.*

Solicitor for plaintiff: *Lathom.*

Solicitor for defendants: *J. N. Mason & Co., for Sworder & Longmore, Hertford.*

A. P. P. K.

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JONES AND PARRY, APPELLANTS; DAVIES, RESPONDENT.

1898

*Jan.* 21.

*Fishery Acts—Salmon—Device to Catch Fish—Nets—"Other like Instrument"—Salmon Fishery Act*, 1861 (24 & 25 *Vict. c.* 109), *s.* 8—*Salmon Fishery Act*, 1873 (36 & 37 *Vict. c.* 71), *s.* 18.

A fishing net with an illegally small mesh is not a "like instrument" to a snare within the meaning of s. 8 of the Salmon Fishery Act, 1861, as extended by s. 18 of the Salmon Fishery Act, 1873; and, therefore, the mere possession of such a net, although with the intention of catching salmon by means thereof, is not an offence within those Acts.

CASE stated by justices under the Summary Jurisdiction Acts.

The respondent, who was clerk to the Board of Conservators of the Dovey Mawddach and Glaslyn Salmon Fishery District, preferred an information against the appellants under s. 8, sub-s. 3, of the Salmon Fishery Act, 1861, charging that they on July 13, 1897, at Dolgelly, unlawfully had in their possession a certain instrument for catching salmon, to wit, a net, under such circumstances as to satisfy the Court before whom they should be tried that they intended at the time to catch salmon by means thereof.

It was proved that on the day in question the appellants were found in a field abutting on a salmon river within the district of the Board of Conservators, having in their possession a net twenty-five yards long, the meshes of which varied from half an inch to one and a half inches in diameter, and the justices

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found, as a fact, that they intended at the time to catch salmon by means thereof.

It was contended for the appellants that a net was not such an instrument as was contemplated by sub-s. 3 of s. 8 of the Salmon Fishery Act, 1861, as amended by s. 18 of the Salmon Fishery Act, 1873 (1); but the magistrates held that the net was "a like instrument" for catching or killing salmon within the meaning of those sections. They accordingly convicted the appellants, and stated this case for the opinion of the Court.

*Honoratus Lloyd*, for the appellants. A net is not "a like instrument" within the meaning of s. 8 of the Act of 1861, as amended by s. 18 of the Act of 1873, and the mere possession of a net is therefore not an offence. Sect. 10 of the Act of 1861 makes provision against taking salmon with a net having a mesh less than two inches across; and s. 12, sub-s. 2, provides that nets used in connection with an unlawful dam shall be forfeited, but there is no provision against the mere possession of an unlawful net. Fishing for salmon with nets is recognised by s. 33 of the Salmon Fishery Amendment Act, 1865 (28 & 29 Vict. c. 121).

If it had been intended to include "nets" under the words "other like instrument," provision would have been made for

(1) By the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), s. 8, "No person shall do the following things, or any of them, that is to say:—

"(1.) Use any light for the purpose of catching salmon.

"(2.) Use any spear, gaff, strokehall, snatch or other like instrument for the purpose of catching salmon.

"(3.) Have in his possession a light or any of the foregoing instruments under such circumstances as to satisfy the Court before whom he is tried that he intended at the time to catch salmon by means thereof."

"And any person acting in contravention of this section shall incur a penalty . . . . but this section shall not apply to any person using a gaff as auxiliary to angling with a rod and line."

By the Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 18, sub-s. 1, "The eighth section of the Salmon Fishery Act, 1861, shall be construed as if the words 'otter lath, or jack, wire or snare' were inserted after the word 'any,' and as if the words 'or killing' were inserted after the word 'catching' in the second sub-section, and as if the words 'or kill' were inserted after the words 'to catch' in the third sub-section."

the use of a landing net as auxiliary to angling with a rod and line, as is done with regard to the use of a gaff by s. 8.

*Montague Lush*, for the respondent. A net is a like instrument to a wire or snare. It is a means for enclosing or detaining a fish externally. In *Allen* v. *Thompson* (1) a snare was held to be of like character to a net.

Unless the appellants come within this section, the possession of a net with meshes of unlawful size is no offence even though, as is the case here, the appellants are found with it in the neighbourhood of a salmon river and intending to catch salmon by its means. The appellants were not found using the net, and, therefore, no proceedings can be taken against them under s. 10 of the Act of 1861.

DAY J. I am clearly of opinion that this conviction must be set aside. The justices have convicted the appellants under s. 8 of the Act of 1861 for being in possession of a net, and the contention is that a net is an "other like instrument" to the instruments mentioned in that section as extended by s. 18 of the Act of 1873. It is said that a net is a like instrument to a wire or a snare. I cannot think so. A net does not seem to me ejusdem generis with a snare. The things are entirely different. I think the justices were wrong, and that their decision must be reversed.

LAWRANCE J. I am of the same opinion. It seems to me absolutely clear that the intention of the Salmon Fishery Acts was to deal differently with legal and illegal methods of taking fish. The legal and recognised modes of fishing are angling with rod and line, and fishing with a net. It is plain that these methods of catching fish are recognised by the Legislature, which, however, prohibits the illegal methods of catching fish, such as by gaffs, wires, and snares, by s. 8 of the Act of 1861, and s. 18 of the Act of 1873, or by poison by s. 5 of the Act of 1861, and s. 13 of the Act of 1873. Fishing with a net having too small a mesh is prohibited by s. 10 of the Act of 1861; and if this net was an illegal net, it is under that section,

(1) (1870) L. R. 5 Q. B. 336.

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Lawrance J.

and not under s. 8, that the information ought to have been framed. But the mere possession of a net, even with a too small and therefore illegal mesh, is not made illegal by either of the Acts. I do not think that a net can possibly be held to be a like instrument to a wire or snare; and therefore, in my opinion, no offence under s. 8 was committed by the appellants.

*Appeal allowed.*

Solicitor for appellants: *R. Guthrie Jones, Dolgelly.*

Solicitor for respondent: *Davies Jones*, for *W. R. Davies, Dolgelly.*

A. P. P. K.

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*Dec.* 14.

## THE CITY OF LONDON BREWERY COMPANY, LIMITED, APPELLANTS; THE COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

*Revenue—Stamp—Mortgage—Trust Deed for securing Debentures—Transfer of Mortgage—Substituted Security—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 86, *sub-s.* 1; *s.* 88, *sub-s.* 1; *Sched. I.*

A limited company issued in 1892 500,000*l.* 4 per cent. debenture stock, secured by a trust deed which was duly stamped. By a subsequent trust deed for securing debenture stock made in 1897, and having the same trustees, after reciting that the 500,000*l.* debenture stock was still outstanding and that the company was intending to issue further irredeemable 3½ per cent. debenture stock, the amount of stock to be issued was limited in the first instance to 300,000*l.*, the company acknowledging in the deed that they were indebted to the trustees in that sum carrying interest at 3½ per cent. The company were to be at liberty to issue further 3½ per cent. debenture stock not exceeding 540,000*l.*, making a total of 840,000*l.*; such further stock was only to be issued for the purpose of redeeming or paying off the 500,000*l.* 4 per cent. stock at the rate of not more than 108*l.* of the new stock for every 100*l.* of the stock redeemed or paid off. Before issuing any of the further debenture stock the company were to execute and deliver to the trustees an acknowledgment of indebtedness for the amount of the further proposed issue, and the trustees were to certify on the trust deed that the company were entitled to make the issue:—

*Held*, first, that the trust deed was a security for the repayment of 840,000*l.* advanced or to be advanced within the meaning of s. 86, sub-s. 1, and s. 88, sub-s. 1, of the Stamp Act, 1891, notwithstanding that certain preliminaries must necessarily be complied with before the issue of any further stock in excess of 300,000*l.*; and secondly, that in respect of

500,000*l.* the deed was not a transfer of a mortgage, but was a substituted security, and was therefore only liable to the reduced ad valorem duty of 6*d.* per cent. under the heading "Mortgage, Bond, Debenture, Covenant" in the 1st schedule to the Stamp Act, 1891.

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CITY OF LONDON BREWERY COMPANY *v.* INLAND REVENUE COMMISSIONERS.

CASE stated by the Commissioners of Inland Revenue pursuant to 54 & 55 Vict. c. 39, s. 13.

The instrument presented for the opinion of the commissioners was a trust deed for securing debenture stock, dated May 6, 1897, and made between the appellants of the one part and certain trustees of the other part. After reciting that there was then outstanding 500,000*l.* debenture stock of the appellants constituted and secured by a trust deed dated February 20, 1892, and reciting the determination of the appellants to issue further debenture stock to be called irredeemable 3½ per cent. debenture stock ranking after the former debenture stock, and to be constituted and secured in manner thereinafter provided, it was witnessed and declared (inter alia) as follows:—

By clause 1, that the expressions following should have the meanings thereinafter mentioned, that is, "stock" meant the amount of the appellants' indebtedness to the trustees under clauses 2 and 7 thereof; "the stockholders" meant as regards registered stock the several persons for the time being entered in the register thereinafter mentioned as the holders of the stock, or as regards stock represented by certificates to bearer, the bearers for the time being of such certificates. "The 4 per cent. stock" meant such of the existing 500,000*l.* debenture stock as should for the time being be outstanding. By clause 2 the appellants acknowledged that they were indebted to the trustee in the sum of 300,000*l.* carrying interest at 3½ per cent. per annum payable half-yearly as therein mentioned. By clause 4 the stock might be issued to such persons and on such terms, and either at par, or at a discount, or at a premium as the appellants should determine. Clause 5 provided for payment off by the appellants of the stock as and when the same or any part thereof ought to be paid off in accordance with the provisions of the deed, and for payment of interest meanwhile. Clause 6 provided that the stock should be held subject to the conditions set forth in the 1st schedule

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thereto, and that such conditions should be binding on the appellants and the stockholders and all other persons claiming through them respectively.

Clause 7 limited the amount of stock to be issued, and was in the following terms: "The stock is limited in the first instance to 300,000*l.*, but the company is to be at liberty to issue further irredeemable 3½ per cent. debenture stock, entitled pari passu to the benefit hereof, subject to the following provisions, that is to say:—

"(*a*) Such further irredeemable 3½ per cent. debenture stock shall not exceed 540,000*l.* in amount, making, with 300,000*l.* stock above mentioned, a total of 840,000*l.*

"(*b*) Such further stock shall only be issued for the purpose of redeeming or paying off the 4 per cent. debenture stock of 500,000*l.*

"(*c*) Whenever it is proposed to issue any of the said further irredeemable 3½ per cent. debenture stock, the company must notify in writing to the trustees or trustee the amount of the proposed further issue, and must satisfy the trustees or trustee that by arrangement with the holders of a corresponding amount of 4 per cent. debenture stock, or by reason of notice of redemption having been given, the company is in a position to pay off or redeem a corresponding amount of the 4 per cent. debenture stock, and must provide to the satisfaction of the trustees or trustee for the application of such further debenture stock, or of the proceeds thereof, to such redemption or payment and for the transfer of the 4 per cent. debenture stock to be redeemed or paid off, and the securities for the same, to the trustees or trustee hereof, and for the purposes of this clause the corresponding amount aforesaid is to be calculated on the basis that not more than 108*l.* of the further irredeemable 3½ per cent. debenture stock is to be issued in respect of every 100*l.* of the 4 per cent. debenture stock redeemed or paid off.

"(*d*) The company must, before any of the said further debenture stock is issued or offered for subscription, execute and deliver to the trustees or trustee an acknowledgment of indebtedness for the amount of the further proposed issue, duly stamped and framed in accordance with clause 2 hereof, and

until such acknowledgment is so executed, stamped, and delivered, no part of such further stock is to be entitled to the benefit hereof.

"(*e*) No such further stock shall be issued or offered for subscription unless and until the trustees or trustee shall have certified hereon that the company is entitled to issue the same."

By clauses 8 and 9 the appellants conveyed and demised by way of mortgage certain freehold and leasehold properties to the trustees, subject nevertheless to the 4 per cent. debenture stock and the securities for the same, and subject to the proviso as to reconveyance thereafter contained; and by clause 10 they charged in favour of the trustees their other assets both present and future with the payment of all moneys for the time being owing on the security of the now stating deed. Clause 12 provided in what events the security thereby constituted should become enforceable. Clause 15 provided that the trustees should hold the moneys to arise from any sale upon trust to pay expenses, and to apply the residue, first, in or towards payment to the stockholders pari passu in proportion to the amount due to them respectively of all arrears of interest remaining unpaid on the stock held by them respectively; secondly, in or towards payment to the stockholders pari passu in proportion to the stock held by them respectively, and without any preference or priority on account of priority of issue or otherwise howsoever, of all principal moneys due in respect of the stock held by them respectively, and that whether the same principal moneys should or should not then be payable; thirdly, should pay the surplus (if any) of such moneys to the appellants or their assigns. Clause 46 contained a proviso for reconveyance of the mortgaged premises upon proof being given to the reasonable satisfaction of the trustees that all the stock entitled to the benefit of the trusts therein contained and for the time being issued had been paid off or satisfied.

The conditions contained in the 1st schedule comprised (inter alia) the following: (1.) If and when the stock thereby constituted became liable to be paid off, the appellants would, subject to the now stating conditions, pay to the several holders

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of the stock the moneys due to them therefor, calculated at the rate of 100*l.* sterling for every 100*l.* of stock, unless the security should become enforceable by reason of the passing of an effective resolution for voluntary winding-up, in which case the amount should be the full value of the stock calculated as therein mentioned; but in any case not less than par. The instrument also contained other provisions incidental to a security for the payment of the moneys secured thereunder.

Up to the time when the instrument was presented to the commissioners for their opinion, no acknowledgment of indebtedness referred to in clause 7 (*d*) had been executed and delivered by the appellants.

The commissioners were of opinion that the sum of 840,000*l.* mentioned in clause 7 was the limit of the total amount secured by or to be ultimately recoverable under the trust deed within the meaning of s. 88, sub-s. 1, of the Stamp Act, 1891. They therefore charged the instrument with the duty chargeable under the head "Mortgage, &c." in the 1st schedule to the Stamp Act, 1891, by reference to s. 86, sub-s. 1, of that Act, and they assessed such duty at 1050*l.*, being 2*s.* 6*d.* for every 100*l.* of the amount secured. The appellants, being dissatisfied with the assessment so far as regards 675*l.*, part of the duty assessed, being the amount attributable to the sum of 540,000*l.*, had required the commissioners to state a case. The questions for the opinion of the Court were whether the instrument was chargeable with the duty of 1050*l.* in accordance with the assessment of the commissioners, and, if not, with what duty it was chargeable. (1)

(1) By 54 & 55 Vict. c. 39 (The Stamp Act, 1891), s. 86, sub-s. 1, "For the purposes of this Act the expression 'mortgage' means a security by way of mortgage for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable, or for the repayment of money to be thereafter lent, advanced, or paid . . . ."

By s. 87, sub-s. 3, "A transfer of a duly stamped security, and a security by way of further charge for money or stock, added to money or stock previously secured by a duly stamped instrument, is not to be charged with any duty by reason of its containing any further or additional security for the money or stock transferred or previously secured, or the interest or dividends thereof, or any new covenant, proviso, power, stipulation, or agreement in relation thereto, or any

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*Bosanquet, Q.C.* (*M. Macnaghten* with him), for the appellants. Except as to 300,000*l.*, the instrument is not a security for money to be advanced within the meaning of s. 88, sub-s. 1, of the Stamp Act, 1891. The expression "money to be advanced," as used in ss. 86 and 88 of that Act, means money to be advanced on the security of the particular instrument which is being adjudicated upon; it does not extend the taxing clause so as to make the instrument liable to ad valorem duty in cases where a second instrument is necessary upon the security of which the advance is to be made. In the present case this instrument will take effect as to the 540,000*l.* when the preliminaries provided for by clause 7 have been complied with, but the money will not have been advanced on the security of this instrument. Assuming, however, that it is a security for the repayment of 540,000*l.* to be thereafter advanced, it is either a transfer of a mortgage, or at most a substituted security, and in the latter case liable only to an ad valorem duty of 6*d.* per cent. under clause 2 of the heading "Mortgage, Bond, Debenture, Covenant," in the 1st schedule to the Act. [He cited *Wale* v. *Inland Revenue Commissioners.* (1)]

*The Solicitor-General* (*Sir R. B. Finlay, Q.C.*) (*Danckwerts* with him), for the respondents. The instrument is one which in a certain contemplated event will secure money up to 840,000*l.*; it is a security for the 300,000*l.* immediately wanted, and will be a security for the further 540,000*l.* when raised.

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further assurance of the property comprised in the transferred or previous security."

By s. 88, sub-s. 1, "A security for the payment or repayment of money to be lent, advanced, or paid, or which may become due upon an account current, either with or without money previously due, is to be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited."

Under the heading "Mortgage, Bond, Debenture, Covenant," in the first schedule to the Act, an instrument, "being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money," is chargeable with ad valorem duty at the rate of 2*s.* 6*d.* per cent.; while an instrument, "being a collateral, or auxiliary, or additional, or substituted security (other than an equitable mortgage), or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped," is chargeable with an ad valorem duty of 6*d.* per cent.

(1) (1879) 4 Ex. D. 270.

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It is not a transfer of a mortgage, but a creation of a new security at a new rate of interest. In *Wale* v. *Inland Revenue Commissioners* (1), where an instrument was held to be a transfer, a new creditor was introduced; but in the present case there are the same trustees for the old and new issue of debenture stock; to make this case analogous there must be payment off of the original issue of 500,000*l.* and a transfer to the new holders. The instrument is not a substituted security, but an instrument on which money will be advanced; it is an instrument for making a new loan altogether, and not one for giving a substituted security for the 500,000*l.*: this is shewn by the issue of 108*l.* of the new debenture stock in place of 100*l.* of the old stock.

GRANTHAM J. I think that upon the whole our judgment should be in favour of the appellants. One of the contentions raised by them was that this instrument was a transfer of a mortgage, and was therefore not liable to an ad valorem duty. I do not think that it is a transfer in the sense which has been contended for, but I am of opinion that it is a substituted security as far as regards 500,000*l.*, part of the excess over the 300,000*l.* It is a deed in the first instance for the purpose of securing irredeemable 3½ per cent. debenture stock. Part of the system adopted by the company for raising money is that the company is not allowed to raise any money by an issue of debenture stock beyond 300,000*l.* until they give an acknowledgment that they are indebted to the trustees for the amount of the proposed issue; that is all provided for by clause 7, under which the total amount of the issue under this deed is limited to 840,000*l.*, while by clause 2 the appellants acknowledged themselves indebted to the trustees of the deed in the sum of 300,000*l.* Now, what is the purpose for which the 840,000*l.* was wanted? The 300,000*l.* was a new loan, money to be raised for the first time in increase of the amount of existing debenture stock; and then by clause 7, before the rest of this 840,000*l.*, namely, the 540,000*l.*, can be issued, the appellants must do exactly as they did with regard to the 300,000*l.*, namely, give an acknowledgment of indebtedness for that amount, or

(1) 4 Ex. D. 270.

so much of it as it might be from time to time proposed to issue. That seems to shew that the amount limited to be raised under the deed is 840,000*l.* and not 300,000*l.*; and therefore, as far as that part of the case is concerned, the appellants are under a liability to pay duty on 840,000*l.*

But to what duty is the instrument liable? It lies upon the appellants to shew that it is not liable to ad valorem duty at 2*s.* 6*d.* per cent. as upon a mortgage, but to a lower rate of duty. As far as regards the 300,000*l.*, it is admitted that they are liable to pay the 2*s.* 6*d.* per cent. As to the 540,000*l.* which they are raising or contemplate raising by this deed, it seems to me that the object and effect of the transaction is not to make a transfer of an existing mortgage, but to substitute a new security for an old one, thereby reducing the rate and amount of interest payable. It seems to be admitted that, supposing there is a mortgage at 4 per cent., and it is desired to reduce the rate of interest to 3½ per cent., it would only be necessary to insert in or indorse upon the deed an agreement by the mortgagee to take the lower rate of interest, and no stamp duty would be payable. That cannot be done in the present case, and therefore the appellants propose to issue fresh debenture stock with the same trustees for the holders—the same mortgagee, as it were. On that stock the interest is reduced to 3½ per cent., but it is not to be issued to the public generally: it is to be issued only on the express condition that it is in lieu of an equivalent amount of the old 4 per cent. debenture stock. Under those circumstances, therefore, it seems to me that the new stock is substituted for the original stock which carried interest at 4 per cent., and, that being so, the instrument is liable only in respect of that amount to the duty payable in respect of a substituted security. That will apply to 500,000*l.*, which will therefore be only liable to duty at the rate of 6*d.* per cent. As to the 40,000*l.*, which is in the nature of a premium on the new issue, ad valorem duty at 2*s.* 6*d.* per cent. is clearly payable on that amount.

CHANNELL J. I am of the same opinion. As regards the first point, I think it very clear that a security is not the less a security for the repayment of money to be thereafter lent

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within the meaning of s. 86, because there is some preliminary to be gone through before it is lent. Here the preliminary is to be the giving of the certificate or acknowledgment of indebtedness; it might have been a request in writing or something of that nature; but no preliminary provided for by the deed would in my judgment prevent the latter being a security for money to be thereafter lent within the meaning of the deed itself. But I agree with my brother Grantham that on the whole this should be treated as a substituted security so far as regards the excess over the 300,000*l.* (except of course the 40,000*l.*), and chargeable therefore with the 6*d.* duty only. The property is the same in the two cases, though of course the security is in a sense a floating security. The trustees are the same, that is to say, the creditors are the same, the persons to whom the money is due; it is due to them as trustees, and it is due to them as trustees for certain stockholders. The stockholders may or may not be the same persons; in all probability many of them will be the same persons if the substitution takes effect; but it seems to me that at the present time this instrument is not in fact a security for anything but the 300,000*l.* Upon its becoming the security for a further sum it will be so, because it is in substitution for an existing security for 500,000*l.*, and I think that all the various sections of the Act may be looked at to shew that it is intended that the lower rate should be charged in such a case as this. It is true that the instrument is not a transfer, though it is similar to a transfer, and it does not come within s. 87, sub-s. 3; but it seems to me that it is not intended to charge the highest rate of duty on an instrument which is not the main security. Here it will be that in the end; it will be the security for the 540,000*l.*, but it will only be so in substitution for the 500,000*l.*, because it never can subsist as a security for the 540,000*l.* with the 500,000*l.* existing at the same time. The effect of our decision, therefore, is that the duty assessed is reduced to 6*d.* per cent. on 500,000*l.*

*Appeal allowed.*

Solicitors for appellants: *Western & Sons.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

W. J. B.

## BRUNE *v.* JAMES.

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*Jan.* 21.

*County Court—Appeal—Injunction—Action claiming less than* 20*l. Damages—County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 120.

In an action for trespass in the county court the plaintiff claimed 40*s.* damages and an injunction. The judge having given judgment for the plaintiff for damages and an injunction:—

*Held*, that the defendant might appeal against so much of the judgment as granted the injunction without first obtaining the leave of the judge, notwithstanding the provisions of s. 120 of the County Courts Act, 1888.

APPEAL from the county court of Devonshire.

The action was brought for trespass to land, claiming 40*s.* damages against the defendant for trespassing on certain land belonging to the plaintiff, and an injunction to restrain him from going on or across such land.

The defendant paid 6*d.* into court, with a defence denying liability and disclaiming any right to go on such land. The county court judge gave judgment for the plaintiff for the amount paid into court, and also granted the injunction in the terms prayed.

The defendant, without having obtained the leave of the judge to do so, appealed against so much of the judgment as granted an injunction against him.

*Howland Roberts*, for the plaintiff, took the preliminary objection that no appeal would lie without the leave of the judge. By s. 120 of the County Courts Act, 1888, no appeal lies from the decision of a county court judge without the leave of the judge in any action of contract or tort when the debt or damages claimed does not exceed 20*l.* An injunction is a remedy and not a cause of action—*Martin* v. *Bannister* (1)—and it is therefore part of the action for damages.

*H. E. Duke*, for the defendant. The grant of the injunction is a direction of the judge in point of equity from which, by

(1) (1879) 4 Q. B. D. 491.

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s. 120, there is an appeal without first obtaining the judge's leave. The power of the county court to grant an injunction depends on s. 89 of the Judicature Act, 1873, and not on the County Courts Act: *Martin* v. *Bannister*. (1) It is an independent remedy, and a plaintiff cannot, by claiming a small amount of damages as well as an injunction, limit the defendant's right to appeal from the granting of it.

THE COURT (Day and Lawrance JJ.) overruled the objection, holding that since the appeal was merely against the granting of the injunction, which was separate from the claim for damages, it was not necessary for the defendant to obtain the judge's leave to appeal.

The appeal was then heard, and allowed on the merits.

Solicitors for plaintiff: *Foyer & Hordern, for Vallance, Ottery St. Mary.*

Solicitors for defendant: *Torr, Gribble, Oddie & Sinclair, for Every, Honiton.*

(1) 4 Q. B. D. 491.

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A. 1898 Jan. 21.

## *In re* PALMER. *Ex parte* BRIMS.

*Bankruptcy—Bankruptcy Notice—Judgment—Equitable Assignment of Judgment Debt—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 1.

A judgment creditor, who has made an equitable assignment of the judgment debt, may nevertheless issue a bankruptcy notice upon the judgment under the Bankruptcy Act, 1883, s. 4, sub-s. 1 (*g*).

APPEAL from the order of a registrar in bankruptcy setting aside a bankruptcy notice.

The debtor had carried on the business of constructing docks and shipbuilding at Bilbao in Spain in partnership with one Martinez Rivas under the firm of "Martinez Rivas Palmer." The partnership was afterwards converted into a Spanish company, called "La Sociedad de los Astilleros del Nervion," which was formed to take over the business and the assets and liabilities of the partnership. The appellant, a contractor, who had executed work for the partnership in the construction of certain docks in Spain, had sued the debtor and Rivas in this country for 16,273*l.* balance of the price of the work. Judgment was signed against Rivas for default of defence for the amount claimed and 26*l.* 15*s.* 2*d.* costs. The action proceeded against the debtor, and, upon its coming on for trial, he consented to a judgment against him for the amount claimed and costs which were taxed at 217*l.* 1*s.* 10*d.* It was arranged between the debtor and the appellant to the effect that the latter should go out to Bilbao in Spain, and endeavour to obtain payment of the amount due to him from the Sociedad, and that any arrangement which he might make with regard to payment of his claim by the Sociedad should not prejudice his rights against the debtor upon the judgment in respect of any balance remaining unsatisfied. The appellant accordingly went to Bilbao, and an arrangement was made by which the Sociedad was to give bills on account of the debts owing to its

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creditors and those of the partnership, among whom the appellant was included in respect of the amount due to him as before mentioned. In pursuance of this arrangement the appellant received from the Sociedad a bill in respect of the amount so due payable in two years from the date of the bill. Shortly before the maturity of the bill negotiations took place between the debtor and the appellant with reference to a proposal by Rivas to pay the appellant and the other creditors a composition of 7*s.* in the pound, and it was then agreed between the debtor and the appellant in substance that the latter should make the best arrangements he could for getting money from Rivas, so as to reduce the debtor's liability, and that any composition which he might effect with Rivas should be without prejudice to his rights against the debtor upon the judgment in respect of the amount which might remain unsatisfied. Rivas ultimately paid the composition of 7*s.* in the pound, but insisted as a condition of his doing so on the creditors signing receipts in the following form: "La Sociedad de los Astilleros del Nervion (formerly Martinez Rivas Palmer).—Received from Senor José Martinez de la Rivas of Bilbao, merchant, the sum of £—— in full for the purchase of all our claims, ascertained or unascertained, against the above-named Sociedad and/or the said firm of Martinez Rivas Palmer, and whether enumerated below or not; and we agree to waive completion of any contracts outstanding in part or in whole without further consideration, all claims in respect thereof being included herein. In consideration of the payment now made we undertake, if and when called upon, to execute a due assignment of all our claims as above to Senor Martinez Rivas or his nominee." The appellant signed a receipt as above in respect of the amount received by him from Rivas. He subsequently issued and served upon the debtor a bankruptcy notice in respect of the amount still remaining due upon the judgment.

It was contended for the debtor before the registrar that the receipt signed by the appellant as above mentioned amounted to an assignment by him of the judgment debt to Rivas, and therefore the appellant was not a creditor or entitled to issue a bankruptcy notice against the debtor in respect of the judg-

ment. It was contended for the appellant that upon the true construction of the document, having regard to the circumstances under which it was signed, it did not operate as an assignment to Rivas of the judgment debt, but only of the bill given by the Sociedad as before mentioned. The debtor stated in an affidavit made by him that he had as against Rivas a counter-claim for at least 40,000*l.* in respect of his wrongfully and maliciously closing the works and shipbuilding yards of the partnership, and dismissing all the workmen upon the same, during his (the debtor's) absence and without his consent, whereby a breach was committed of a highly lucrative shipbuilding contract with the Spanish Government, in consequence of which wrongful act of Rivas the Spanish Government under their powers took possession of the said yard and works and confiscated them. The registrar held that the document operated as an assignment of the judgment debt, and on that ground set aside the bankruptcy notice.

*Pickford*, *Q.C.*, and *Æneas Mackintosh*, for the appellant. The document in question did not amount to an assignment, either legal or equitable, of the judgment debt. (1) At the utmost it was only an agreement to assign, and was not an absolute assignment within the Judicature Act, 1873, s. 25, sub-s. 6, and therefore it could only operate as an equitable assignment of the judgment debt. Assuming that it amounted to an equitable assignment of the judgment debt, the appellant was nevertheless entitled to issue the bankruptcy notice: see *Ex parte Dearle*. (2) It was held in that case that a person who had obtained a judgment, of which he was trustee, could issue a bankruptcy notice, though the cestui que trust must join in the bankruptcy petition founded upon the notice. So here, assuming that the appellant has become a trustee of the judgment debt for Rivas, the bankruptcy notice was nevertheless rightly issued, and the question whether there was an equitable assignment of the judgment debt will arise on the petition. It was held in *Ex parte Blanchett* (3) that an assignee

(1) The argument on this point is not given as the point was not decided.

(2) (1884) 14 Q. B. D. 184.

(3) (1886) 17 Q. B. D. 303.

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of a judgment debt could not issue a bankruptcy notice on the judgment. Sect. 1 of the Bankruptcy Act, 1890, does not take away the appellant's right to issue a bankruptcy notice. The appellant, as being the person for the time being entitled to enforce the judgment by execution, is under that section to be deemed to be a creditor who has obtained final judgment within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883.

*Marshall Hall*, and *R. E. Moore*, for the debtor. The document signed by the appellant was at any rate an equitable assignment of the judgment debt. The appellant, being no longer beneficially interested in the judgment, is not really a creditor of the debtor in respect of the judgment, and therefore is not entitled to issue a bankruptcy notice upon it. This point was never argued in *Ex parte Dearle* (1), which was decided before the passing of the Bankruptcy Act, 1890. In that case there was no change of the beneficial interest in the judgment after it was obtained. It was obtained originally by the judgment creditor as trustee for another person. It would be most inequitable that the appellant, though he has no longer any beneficial interest in the judgment, should be entitled to issue a bankruptcy notice upon it, and so give rise to an act of bankruptcy, while the debtor has a counter-claim against the person really interested in the judgment. It may be that the equitable assignee will have to join as a petitioning creditor in any petition founded on an act of bankruptcy in respect of the judgment, but the debtor, having a counter-claim against the person beneficially entitled to the judgment debt, ought to have the opportunity of preventing an act of bankruptcy from arising in respect of the judgment. The debtor cannot after the assignment safely pay the balance of the judgment debt to the appellant in compliance with the bankruptcy notice. Sect. 1 of the Bankruptcy Act, 1890, which was passed subsequently to the decision in *Ex parte Dearle* (1), provides that any person who is for the time being entitled to enforce a final judgment shall be deemed a creditor who has obtained a final judgment within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act,

(1) 14 Q. B. D. 184.

1883. It is submitted that it was intended by that section to enable an assignee of a judgment to issue a bankruptcy notice, and that the appellant, having parted with all beneficial interest in the judgment debt, is not a person entitled to enforce the judgment within that section, and therefore cannot be deemed a creditor who has obtained a final judgment within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883. The Court can, in the exercise of its inherent right to control its own procedure, set aside the bankruptcy notice, if it is inequitable that it should be issued: *In re Connan.* (1)

*Pickford, Q.C.*, in reply. Sect. 1 of the Bankruptcy Act, 1890, does not affect the law as laid down on the subject in *Ex parte Dearle.* (2) It was passed not to restrict the right of a person who has obtained a judgment to issue a bankruptcy notice under s. 4, sub-s. 1 (*g*), of the Act of 1883, but to extend the right to issue a bankruptcy notice to persons for the time being entitled to enforce a judgment such as executors or trustees in bankruptcy. [He cited *In re Goldring.* (3) ]

A. L. SMITH L.J. Several points have been argued in this case. The question which was raised first, and to which the argument was chiefly directed, was whether by a certain document the judgment against the debtor had been assigned to Rivas. In the view which I take of this case, it is not necessary to decide that question now. It is quite clear, I think, that the document was not an absolute, legal, assignment of the judgment, but was at most an equitable assignment of it. The question therefore arises whether, assuming that there was an equitable assignment of the judgment (which point I do not decide), the appellant was entitled to issue the bankruptcy notice.

The appellant has obtained a final judgment against the debtor, and, therefore, to the extent to which that judgment remains unsatisfied, he is primâ facie entitled to issue a bankruptcy notice upon it. It was argued before the registrar that the bankruptcy notice ought not to have been issued, or, at any

(1) (1888) 20 Q. B. D. 690. (2) 14 Q. B. D. 184.
(3) (1888) 22 Q. B. D. 87.

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rate, ought to be set aside, because the appellant had assigned the judgment debt to Rivas; and he came to the conclusion that the document in question did constitute such an assignment, and therefore set aside the notice; but the point was never raised before him that, however construed, the document did not amount to an absolute or legal assignment of the judgment, but only to an equitable assignment of it.

I am of opinion that, the assignment, if any, not amounting to a legal assignment, and the appellant still being legally entitled to enforce the judgment, he has a right, whether s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, or s. 1 of the Bankruptcy Act, 1890, be looked at, to issue a bankruptcy notice upon the judgment. The passages which have been cited from the judgments in *Ex parte Dearle* (1) shew that a bankruptcy notice may be issued by a person who is in the position of the appellant, that is to say, who has obtained a judgment and is still legally entitled to enforce it.

It was argued that it would be inequitable to allow the appellant to issue a bankruptcy notice upon this judgment, because he was merely a trustee of it, and the debtor had a counter-claim or set-off exceeding the amount of it against Rivas, the person said to be beneficially interested in it. I am not at all satisfied that there is any foundation for the alleged claim against Rivas by the debtor. There is only a bare statement in one paragraph of the debtor's affidavit to the effect that he has a claim against Rivas to the extent of £40,000. I do not think that we ought to act upon such slender materials. Moreover, if his claim is well founded, it is a claim, not against the judgment creditor, but against Rivas; and, speaking for myself, I think the counter-claim or set-off mentioned in s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, is confined to a counter-claim or set-off against the judgment creditor. For these reasons I think the appeal should be allowed.

CHITTY L.J. I also think that the bankruptcy notice ought to stand. The appellant, who obtained the issue of the bankruptcy notice in this case, was unquestionably a judgment

(1) 14 Q. B. D. 184.

creditor of the debtor, and was the person who, as matters stood, had in law the right to enforce the judgment. The document, upon which the debtor relies as constituting an assignment of the judgment debt, amounts at the utmost only to an equitable assignment of it. There is no mode in which a debt can be assigned so as to pass the legal right to sue for it except by following the provisions of s. 25, sub-s. 6, of the Judicature Act, 1873. That was not done in the present case, and therefore the legal right to issue execution upon the judgment remained vested in the appellant. I will assume, for the purposes of my judgment on this appeal, that there was an equitable assignment of the judgment debt, and therefore the appellant was trustee of this legal right for the benefit of the equitable assignee. But, assuming that to be so, I can find no reason under the Bankruptcy Acts for holding that the appellant is not a person who, by virtue of s. 4, sub-s. 1 (*g*), of the Act of 1883, is entitled to issue a bankruptcy notice upon the judgment. It will be a different matter when it comes to be a question of presenting a bankruptcy petition against the debtor; for then, according to the decision in *Ex parte Dearle* (1), unless the appellant thinks fit to rest his case wholly upon the contention that there was no assignment of the judgment even in equity, he must join Rivas as a petitioner. I only wish to add that, in my opinion, s. 1 of the Bankruptcy Act, 1890, does not in any way affect the right of a person in the position of the appellant to issue a bankruptcy notice under sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883. It may have extended the right to issue such a notice to persons who would not have been within that sub-section, but I can see nothing in its terms to take away any right which the appellant would have under that sub-section standing alone.

COLLINS L.J. concurred.

*Appeal allowed.*

Solicitors for appellant: *J. E. & H. Scott.*

Solicitors for debtor: *Baker, Folder & Upperton.*

(1) 14 Q. B. D. 184.

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*Nov.* 30:
*Dec.* 1, 2, 20.

[IN THE COURT OF APPEAL.]

## ELLIS *v.* POND AND THE BLOOMSBURY SYNDICATE.

*Principal and Agent—Indemnity—Broker—Stock Exchange—Wrongful Sale by Broker.*

A stock-broker who on behalf of a principal buys stock upon the Stock Exchange for the next settling day, and without authority from his principal, and contrary to the agreement between them, sells the stock before that day at a loss, cannot claim indemnity from his principal.

The plaintiff, a stock-broker, having prior to November 10 bought stock of a railway company for the defendant on the London Stock Exchange, it was agreed between them that the plaintiff should take part of the stock so purchased off the market by paying for it with money advanced by him for the purpose, which he accordingly did, and that he should hold that stock as security for his advance with interest, and should not sell the same before the account of November 26. On November 10 the plaintiff by the defendant's instructions carried over the residue of the stock till November 26, and bought a further amount of stock for that day. On November 19 the plaintiff, without the defendant's authority, and contrary to his agreement, sold the whole amount of stock purchased at a loss in order to close the account between them. If the stock had been sold on November 26, it would have realized a price higher than that at which the plaintiff sold, but lower than that at which he had bought it for the defendant. In an action by the plaintiff against the defendant for indemnity in respect of the difference between the prices at which he had bought and sold the stock:—

*Held*, first, as to the plaintiff's claim in respect of the stock paid for and taken off the market by the plaintiff as before mentioned, that the plaintiff was entitled to recover as for money paid for the defendant at his request, subject to the defendant's right to counter-claim damages for the loss occasioned by the plaintiff's wrongfully selling the stock before November 26:—

*Held*, secondly, as to the plaintiff's claim in respect of the stock carried over and that which was purchased on November 10 as before mentioned (by A. L. Smith L.J. and Collins L.J., Rigby L.J. dissenting), that no action for indemnity was maintainable, the loss having arisen, not through any breach of contract by the defendant, but through the wrongful sale by the plaintiff.

By Rigby L.J., in affirmance of Mathew J., that the plaintiff was entitled to be credited in account with the price at which he purchased for the

defendant, being charged by way of damages with the loss arising from the wrongful sale.

*Duncan* v. *Hill*, (1873) L. R. 8 Ex. 242, and *Lacey* v. *Hill*, *Scrimgeour's Claim*, (1873) L. R. 8 Ch. 921, discussed.

APPEAL from the judgment of Mathew J. in an action tried before him with a special jury and application for a new trial.

The action was brought by the plaintiff, a broker on the London Stock Exchange, to recover a sum of 8551*l.* 0*s.* 11*d.* as a balance of account due from the defendants to the plaintiff in respect of stocks and shares bought and sold by the plaintiff for the defendants at their request, and for commission thereon and moneys expended in respect thereof.

The defendant Pond was the author of a project for the construction of an electric railway in connection with the Metropolitan District Railway, and a syndicate, of which he was a member, had been formed for the purposes of that project. The defendant Pond had instructed the plaintiff to act as broker for the syndicate—the names of the members of which he did not disclose—in various transactions on the Stock Exchange, and certain items on both sides of the account were not in dispute. The facts, so far as the disputed items were concerned, were as follows. It was considered necessary for the purposes of the scheme that the syndicate should possess a large holding in the stock of the Metropolitan District Railway Company, and the defendant Pond from time to time instructed the plaintiff to purchase for the syndicate stock of that company. Previously to November 10, 1896, which was carrying-over day on the Stock Exchange, the plaintiff had bought for the syndicate on the instructions of the defendant Pond large amounts of the ordinary stock of the company. Of the stock so purchased stock to the nominal value of 105,000*l.* had, at the defendant Pond's request, been taken off the market by the plaintiff—that is to say, paid for by the plaintiff, partly with money supplied to him by the defendant Pond, but to a large extent with money advanced by the plaintiff, some of which he borrowed from his bankers for the purpose. The plaintiff had procured delivery to himself or his nominees of the stock so taken off the market, which was thus held as security

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for the plaintiff's advances with interest. On November 10 the plaintiff, on the instructions of the defendant Pond, carried over to the next account, which was on November 26, the stock which had not been taken off the market, namely, stock to the nominal value of 35,000*l.*, at 29½, and purchased for the same account 5000*l.* Metropolitan District Ordinary Stock at 29⅝, and 5000*l.* of the same stock at 29¾. Some Metropolitan District Preference Stock, which had been bought by the plaintiff upon the defendant Pond's instructions, was also carried over till November 26; but it is not necessary for the purposes of this report to state the facts with regard to that item. As will be seen hereafter, the jury found that, as to the whole of the above-mentioned 150,000*l.* ordinary stock, the plaintiff had agreed not to sell before November 26.

The plaintiff, becoming alarmed at the state of the market, and being unable to obtain from the defendant Pond the names of the members of the syndicate, or cover, which he claimed to be entitled to under the arrangement between them, to what he considered a sufficient amount, wrote to the defendant Pond on November 18, enclosing an account which shewed differences against the defendants to the amount of about 5000*l.*, and asking him to give instructions with reference to closing the account by eleven o'clock the next morning, failing which he, the plaintiff, would be obliged to take the matter into his own hands and proceed to realize the stock. The defendant Pond failing to give any instructions, the plaintiff on November 19 sold for the account of November 26 10,000*l.* Metropolitan District Ordinary Stock to certain dealers at or about 26½, and 140,000*l.* of the same stock to a Mr. Early Smith, a dealer, at 25, intending to treat the sales as made on account of the syndicate with a view to closing his account with them at once. He wrote letters on the same day to the defendant Pond, advising him of the sales, and enclosing the contract notes in respect of them. In his letter with reference to the sale of the 10,000*l.* stock at the above-mentioned price, he said it was the best he could do in accordance with his letter of yesterday's date. In his letter with regard to the sale of the 140,000*l.* stock, he said that he had disposed of "the block of

140,000*l.* Metropolitan District Railway Ordinary Stock." The defendant Pond at once wrote in reply returning the contract notes, and stating that the plaintiff had no instructions to sell.

On November 24 the plaintiff issued the writ in the action claiming a balance of 8551*l.* 0*s.* 11*d.* as above mentioned. The account as stated in the indorsement on the writ, in addition to items both on the credit and debit side as to which there was no dispute, debited the defendants with the amounts payable on November 26 as the prices of the 35,000*l.* Metropolitan District Ordinary Stock carried over, and the 10,000*l.* of the same stock bought on November 10 as before mentioned, and credited the defendants with the amounts payable on November 26 as the price of the 150,000*l.* Metropolitan District Ordinary Stock sold on November 19 as before mentioned. The writ was served upon the defendant Pond with a notice informing him that it was served upon him as a partner in the Bloomsbury Syndicate. He entered an appearance under protest denying that he was a partner in the syndicate. The plaintiff applied for judgment under Order XIV., but leave was given to defend the action. Upon an issue tried in the action it was found that the defendant Pond was a partner in the syndicate, and he was thereupon ordered to disclose the names of the members of the syndicate, which he was unwilling to do. In order to avoid the necessity of his doing so, it was arranged that he should pay into court the total amount claimed by the plaintiff in the action to abide the result of it, and, upon his doing so, the order for disclosure of the names of the other members of the syndicate was rescinded, and the action proceeded against the defendant Pond alone. A defence was delivered by the defendant on December 31, 1896, accompanied by a counter-claim. The defence alleged that on November 19 the plaintiff wrongfully and in breach of the plaintiff's duty as agent, and against express instructions by the defendant, closed the accounts of the stocks in question at a loss; that, if the plaintiff as broker had any right to close the said accounts before the account day, which was denied, that right could only be exercised after proper and reasonable notice, and the plaintiff had not given proper and reasonable notice to the defendant;

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and that the plaintiff was guilty of negligence in the realization of the stocks and, if he had in realizing the same acted with proper skill and care, they would have realized more than enough to cover the amount of the loss in respect of which the plaintiff was claiming. The counter-claim claimed 25,000*l.* damages for the breach of an alleged agreement by the plaintiff to assist the defendant in carrying out the before-mentioned project for the construction of an electric railway, and (2.) for improperly and negligently realizing the before-mentioned stocks, and also claimed accounts of the sales of the stocks and of all the dealings of the plaintiff in respect of the same.

At the trial the learned judge left the following questions to the jury on the claim and counter-claim respectively, which were answered as follows. On the claim:—1. Did the plaintiff agree not to sell the stock before November 26? Answer: He did. 2. Did the defendant, when he employed the plaintiff as his broker, or at any other time, agree to give cover to any and what amount? Answer: There was no agreement at first, but the defendant afterwards admitted the plaintiff's right to cover. 3. Did the plaintiff agree to give the defendant notice before he closed the account, and was the notice he gave reasonable? Answer: There is no evidence of any agreement to give the defendant notice, but we consider the notice was unreasonably short. 4. Did the plaintiff in selling the stock act in good faith and with proper care and skill? Answer: No, he did not. (1) 5. If the stock had not been disposed of to Smith, for what amount could the plaintiff have sold it? Answer: 28*l.* (meaning at the rate of 28*l.* for 100*l.* nominal). On the counter-claim: 1. Did the plaintiff as broker for the defendant agree with the defendant to assist the defendant in carrying out the scheme of the electric railway? Answer: Yes. 2. Did he fail to do so? Answer: No. The learned judge upon the answers so given directed that judgment should be entered for the plaintiff on the claim for 415*l.*, and on the counter-claim with costs.

(1) As will be seen from the judgments, it was not suggested that this finding meant that the plaintiff had been guilty of any fraud or dishonesty in the matter, but merely that the sale was contrary to the agreement between the plaintiff and defendant.

In arriving at the amount for which he gave judgment on the claim, he credited the plaintiff with, among other items, the amount of the moneys advanced by the plaintiff as before mentioned and of the prices at which the 35,000*l.* Metropolitan District Railway Ordinary Stock was carried over and the 10,000*l.* of the same stock was purchased on November 10, and debited the plaintiff, among other items, with the value of 150,000*l.* of the same stock at the figure found by the jury, namely 28, instead of the price at which it was actually sold on November 19.

Against this judgment the defendant appealed. He also applied for a new trial with regard to the finding of the jury on the second question left to them upon the counter-claim. (1)

Nov. 30; Dec. 1, 2. *Lawson Walton, Q.C.*, and *H. Tindal Atkinson*, for the defendant. The sale of the 150,000*l.* stock being, as found by the jury, contrary to the plaintiff's agreement, he cannot recover the differences he claims in respect thereof. The jury have found that the plaintiff agreed not to sell the stock until November 26. The implied contract of indemnity in the case of principal and agent is to indemnify the agent against liability incurred by him under the contract which he is instructed to make by the principal, not against loss arising through an unauthorized act done by him contrary to his agreement. The sale being therefore wrongful as against the defendant, the plaintiff is not entitled to be indemnified by the defendant against any loss which occurred thereon. The defendant committed no breach of his contract with the plaintiff, for by the terms of that contract he was not bound to pay for the stock until November 26, and before that date the plaintiff disposed of the stock without authority, and thereby prevented the stock from being delivered to the defendant, and

(1) The application for a new trial on the counter-claim did not involve any reportable point, and therefore the facts and arguments in relation thereto are not given. It will be observed that it was argued for the plaintiff that one of the points raised was not open to the defendant, having regard to the lines on which the case was conducted at the trial. The facts with regard to what took place at the trial, so far as not stated above, may be gathered from the judgments.

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the contract from being carried out. The plaintiff cannot claim as for money paid at the defendant's request, nor can he claim damages as on a breach of a contract to indemnify. The defendant could only be liable to indemnify the plaintiff against the consequences of a breach by him of the contract which he instructed the plaintiff to make. But the defendant was guilty of no such breach. He was not bound on November 26 to pay for the stock, of which, through the wrongful act of the plaintiff, he could not obtain delivery. Therefore there was no payment of money by the plaintiff for the defendant at his request, for under the circumstances no such request can be implied; nor was there any breach of a contract by the defendant to indemnify the plaintiff, for by the plaintiff's own act the contingency upon which his right to indemnity depended never could arise.

The learned judge treated the case on the footing that the plaintiff was entitled to the differences which he claimed, subject to a deduction in respect of the loss occasioned by the plaintiff's breach of contract in selling before November 26, that is to say, a deduction of the difference between the price at which the stocks were actually sold on November 19 and their value at 28, the figure found by the jury as being the price at which they might have been sold on November 26. He assumed that the stock would have been sold on November 26; but it is submitted that it was fallacious to assume that the stock must necessarily have been sold on that day; for, if the plaintiff had not broken his contract by selling before that day, the defendant might on that day have taken up and paid for the stock, or arranged with some other broker to carry it over, and so no liability would have been cast on the plaintiff in respect of which he could claim indemnity, and the defendant might ultimately have made a profit on the stock. If the plaintiff had not thrown the 150,000*l.* of stock on the market on November 19 the price might have been higher on the 26th.

This case is really concluded in favour of the defendant by the case of *Duncan* v. *Hill*. (1)

At the date when the plaintiff issued his writ, namely,

(1) L. R. 8 Ex. 242.

November 24, the action was not maintainable, for the settling day was November 26, and the plaintiff's right to indemnity could not accrue till the day for payment for the stock arrived; and, as before pointed out, the position of the defendant had already been altered by the plaintiff's wrongful act in selling the stock, so that no right to indemnity could ever arise.

*Asquith*, *Q.C.*, and *C. C. Scott* (*Whately* with them), for the plaintiff. A large portion of the stock which was purchased by the plaintiff on the defendant's instructions had been taken off the market, and paid for with moneys advanced by the plaintiff on loan, and was in substance mortgaged as a security for the moneys so advanced. As regards that portion of the stock, the judgment of Mathew J. is correct in principle, for the plaintiff is clearly entitled to recover the moneys so advanced by him, subject to a deduction for any loss sustained through realization of the security before November 26 in breach of the agreement found by the jury. The case on this point is concluded by *Lacey* v. *Hill*, *Scrimgeour's Claim* (1), which is precisely in point.

With regard to the 35,000*l.* of stock carried over and the 10,000*l.* of stock purchased on November 10, it is submitted that the judgment of the learned judge was right as to those items also. The case was fought at the trial on the footing that the only question was as to the amount to be deducted from the plaintiff's claim in respect of loss occasioned to the defendant, because the plaintiff had sold prematurely in breach of his agreement not to sell till November 26. The contention that the plaintiff had no right to an indemnity at all was an afterthought, and was not raised until after the jury had given their verdict. An implied contract by the defendant to indemnify the plaintiff arose upon the purchase by the plaintiff of the stock in accordance with the defendant's instructions, and nothing has occurred to take away the plaintiff's right to that indemnity. The contention appears to be that the plaintiff's right to indemnity against the defendant has been taken away by a rescission of the contract between them. The question whether under the circumstances there was such a rescission

(1) L. R. 8 Ch. 921.

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was one which ought to have been left to the jury, and the defendant's counsel, not having asked that any such question should be put, cannot now raise this point.

In considering the effect of the sale of the stock on November 19, it must be remembered that these contracts are not contracts in respect of specific stock. The plaintiff had, on the defendant's instructions, effected contracts on behalf of the defendant for the purchase of a certain amount of stock on November 26, and was entitled to be indemnified in respect of those contracts. The fact that, for the purpose of regulating the accounts between himself and the defendant, the plaintiff entered on November 19 into contracts for the sale of a like amount of stock on November 26 does not operate as a rescission of the contract between them. That would not prevent the defendant from enforcing performance of the contracts for purchase of the stock or those contracts from being enforced by the jobber. The defendant would be entitled to enforce those contracts against the jobber through another broker, if he were really in a position pecuniarily to do so. There is no suggestion that he ever attempted or meant to do any such thing. It is not likely he would, the stock then being only worth 28, while he had purchased at 29½. The learned judge was under the circumstances quite right in assuming that the stock would have been sold on the 26th. The sale by the plaintiff did not operate as a repudiation of the contract between him and the defendant; and, if it did, it could only effect a rescission of the contract, if the defendant elected to treat it as such. But the defendant did not do so. He treated the sale of the stock as a nullity so far as he was concerned, and insisted upon his rights under the contracts for purchase of the stock. The sale of November 19 could not affect the plaintiff's right to indemnity, unless the jobber was thereby debarred from enforcing the contracts for purchase of the stock which, it is submitted, could not be the case. It is contended that, the contracts for the purchase of the stock remaining unaffected, the plaintiff's right to indemnity in respect of his having incurred liability thereunder at the request of the defendant continued, and the defendant could only claim a deduction

from the plaintiff's claim in respect of loss incurred by reason of the breach by the plaintiff of his promise not to sell before November 26. Suppose instead of going up, the stock had remained at 25 on that day: does it seem just that, merely because the plaintiff sold against the defendant prematurely, the defendant should be relieved of all liability on the contract? The obligation of the defendant to indemnify the plaintiff arose upon the effecting of the contract for purchase of the stock, and, assuming that the contract between broker and client involves an obligation on the part of the broker to procure delivery of the stock for the client on the settling day, the breach of that obligation will not amount to a rescission of the contract or relieve the client of the obligation to indemnify the broker, because it would not prevent the client from enforcing delivery of the stock.

*Duncan* v. *Hill* (1) is distinguishable, for there the effect of the usage of the Stock Exchange seems to have been to put an end to the contract for purchase of the stock.

The fact that the writ was issued before the settling day does not shew that the action was not maintainable. The decisions in Courts of Equity shew that in such a case as this the plaintiff would be entitled, before he had actually paid for the stock, to a declaration that he was entitled to indemnity, and a prospective order directing the defendant to indemnify him: *Wolmershausen* v. *Gullick* (2); *Lloyd* v. *Dimmack* (3); *Hobbs* v. *Wayet* (4); *Wooldridge* v. *Norris* (5); *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (6); and see per Jessel M.R. in *Lacey* v. *Hill, Crowley's Claim.* (7) That being so, and having regard to the circumstances under which the money was paid into court in the action, it is submitted that the Court can order that that money shall be applied in satisfaction of the plaintiff's claim.

[They also cited *Hartas* v. *Ribbons.* (8)]

*Lawson Walton, Q.C.*, in reply. It is submitted that the

(1) L. R. 8 Ex. 242.
(2) [1893] 2 Ch. 514.
(3) (1877) 7 Ch. D. 398.
(4) (1887) 36 Ch. D. 256.
(5) (1868) L. R. 6 Eq. 410.
(6) (1882) 22 Ch. D. 561.
(7) (1874) L. R. 18 Eq. 182, at p. 191.
(8) (1889) 22 Q. B. D. 254.

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distinction taken with regard to the stock that had on November 10 been taken off the market by the plaintiff is untenable. If a broker has command of sufficient capital it may be better worth his while, instead of carrying the stock over with the jobber, to take delivery of it and carry it over as between himself and his client, which appears to have been the effect of what was done in this case. But, if in such a case he sells in breach of his agreement before the settling day at a loss, the same considerations in substance apply as in the case of stock carried over in the ordinary way. He repudiates the contract, and cannot therefore treat the payment for the stock as an advance to his client. The plaintiff in his own statement of the account treated the sales of November 19 as being sales of the stock purchased for the defendant, and thereby shewed clearly that there would be no delivery of stock to the defendant on the 26th, and that so far as he was concerned the contracts for purchase of the stock were rescinded and at an end.

*Cur. adv. vult.*

Dec. 20. The following judgments were read:—

A. L. SMITH L.J. The first question raised upon this appeal is whether a stock-broker who in the ordinary course of business upon the Stock Exchange has rendered himself personally liable to a jobber upon the purchase of stocks on behalf of a principal, and who has contracted for good consideration with that principal that the stocks shall be carried over and not sold before the then next settling day, loses his right of indemnity against his principal if before that day he in breach of his contract sells the stocks against his principal. The broker does not dispute that he is liable to his principal for the damages the latter may sustain by reason of his breach of contract; but he insists that, although he has broken his contract with his principal, he is still entitled to be indemnified by him from the liability he is under to the jobber.

Taking the findings of the jury which are not impeached, and the other proved or admitted facts of this case, they may be stated as follows. The plaintiff is a stock-broker upon the

London Stock Exchange and the defendant Pond (I omit the syndicate) was his client. It is unnecessary to go into the purposes for which the stocks were purchased: it is sufficient to say that prior to November 10, 1896, the plaintiff, as broker, had purchased heavy amounts of stock for the defendant, and upon that day, which was a settling day, the position of matters was this. The plaintiff then held a large amount of the stock so purchased for the defendant, which had been closed by the plaintiff at the request of the defendant, and paid for by the plaintiff by his own or borrowed money. There was also at this date stock of the value of 35,000*l.* nominal still open which the plaintiff as broker had previously purchased for the defendant. There was also stock amounting to 10,000*l.* nominal which the plaintiff purchased upon that day (November 10, 1896), for the defendant at his request, but which was not paid for. This 35,000*l.* of stock the defendant was desirous of having carried over at the then current price of the day, namely, 29½, till the next settling day, and this was the price at which the 10,000*l.* stock had been purchased by the plaintiff for the defendant on that day. In these circumstances the plaintiff for good consideration agreed with the defendant that the 35,000*l.* of stock should be carried over until the next settling day, and he further agreed that none of the stocks above mentioned should be sold before the next settling day, which was November 26, 1896. Upon November 19, 1896, however, the plaintiff for his own purposes sold the stocks at 25, and in so doing did not, as the jury have found, act in good faith and with proper care and skill. The learned counsel on either side agree that the not acting in good faith as found by the jury meant that the sale was not in the honest exercise of a right, in other words, that it was a wrongful sale against the defendant. If these stocks had not been sold until November 26, 1896, as had been agreed, they would have realized 28. Upon November 24, 1896, which it will be seen was two days before the next settling day, the plaintiff issued his writ in this action against the defendant, and the indorsement thereon claimed to recover 8551*l.* 0*s.* 11*d.*, balance of moneys due in respect of stocks and shares bought and sold by the plaintiff for

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A. L. Smith L.J.

the defendant at his request; and he took proceedings thereon under Order XIV. for summary judgment, which, however, were not successful.

As regards the stocks which the plaintiff purchased for the defendant and closed at the request of the defendant by paying for them with his own or borrowed money, in my judgment he is entitled to sue the defendant for money paid by the plaintiff at his request, and as to these stocks the plaintiff is entitled to recover the difference between what he paid for them and what they would have realized upon November 26, 1896. The case of *Duncan* v. *Hill* (1) in the Exchequer Chamber shews that this is so. See the point as to the 1688*l.* in that case. But, although this is so, the defendant is entitled to the damages he has sustained by reason of the plaintiff selling these stocks before November 26, 1896, in breach of his contract with the defendant: *Lacey* v. *Hill, Scrimgeour's Claim.* (2)

I now come to the claim of the plaintiff against the defendant to be indemnified by him against the difference between the price at which the 35,000*l.* of stock was carried over, namely, 29½, and the price it would have realized upon November 26, 1896, and also for indemnity against the difference between the price at which the unpaid-for stock of 10,000*l.* was purchased and the price it would have realized upon that day. That the broker (the plaintiff) made himself personally liable to the jobber in respect of these stocks is undoubted, his obligation being that, if upon the settling day he did not pass to the jobber the name of a purchaser willing to take the stocks at the contract price, he (the broker) would indemnify the jobber against any difference or loss the jobber might sustain thereby. It cannot be denied that down to November 19, 1896, the defendant was under liability to the plaintiff to indemnify him against the claims of the jobber should he (the defendant) break his contract with the plaintiff, and what this contract was I will state in a moment. I do not doubt that, if the plaintiff had upon November 19, 1896, rightfully sold against the defendant, although it was before the settling day of November 26, 1896, he would have been entitled to be indemnified by

(1) L. R. 8 Ex. 242. (2) L. R. 8 Ch. 921.

the defendant for the difference between what he then sold at and what, if anything, he had to pay the jobber, for the defendant would upon this hypothesis have renounced the further performance of his contract with the plaintiff, and the plaintiff would then, upon the authority of such cases as *Hochster* v. *De la Tour* (1) and *Frost* v. *Knight* (2) have been entitled to treat the contract as at an end and to sell against the defendant, and be indemnified by him against any difference there might be between the then selling price and the price contracted to be paid to the jobber. But this, upon the findings of the jury, is not what the plaintiff has done. He has before the next settling day wrongfully sold against the defendant, and he now asks the defendant to indemnify him against the consequences, not of his rightful, but of his wrongful, sale. When this case is understood, it will, I think, be found to be the case of an agent asking his principal to indemnify him against the consequences of his own wrong. If the old money count of money paid at the defendant's request had been resorted to by the plaintiff to recover this difference, the answer of the defendant would have been, "You never paid these differences to the jobber at my request, for what you are suing me for are differences arising out of your having acted directly contrary to my request," and thus this count could not be supported by proof. I now assume a claim founded upon a contract to indemnify, which is the only other claim the plaintiff has as regards the 35,000*l.* and 10,000*l.* of stock. First of all, what is the contract of a buying principal with the broker? In my judgment his contract is that, if the broker will purchase stock for him, he (the principal) will upon the settling day take up and pay for the stock so purchased by the broker, and that, if he does not, he (the principal) will indemnify the broker from the claim of the jobber. This, in my opinion, is the contract between a buying principal and the broker. In an action for indemnity by the broker he must aver and prove a promise by the defendant to indemnify him against loss occasioned to him by reason of his (the defendant's) not performing his contract with the plaintiff, that is, as before stated, not taking up and paying for

(1) (1853) 2 E. & B. 678. (2) (1872) L. R. 7 Ex. 111.

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the stock upon the settling day; and secondly, he must aver and prove by way of breach that the defendant refused or neglected to perform his contract in that behalf, whereby the plaintiff has been damnified. If the plaintiff does not establish that the defendant has refused or neglected to perform his contract with him, in my judgment he clearly fails in his action for indemnity, for it is only upon proof of such refusal or neglect that the right to indemnity arises.

Now, how can the plaintiff prove that in this case the defendant has refused or neglected to take up and pay for the stock upon the settling day, when he has not done so? Upon November 19, 1896, that is, seven days before the settling day, upon which the defendant first came under obligation to the plaintiff to take up and pay for the stock, the plaintiff, in bad faith and without proper care and skill, had sold against him to a person named Smith, and upon November 24, 1896, two days before the settling day, he had brought the present action for the 8551*l.*, shewing unequivocally that, as far as he was concerned and was able to bring it about, the transaction between him and the defendant was at an end, and that, when November 26, 1896, came, no stock whatever would be tendered to the defendant, as in fact it was not. It was not before the settling day that the broker had to pass a name of a purchaser of the stock to the jobber, and it was perfectly open to the broker upon that day to pass the name of Smith. By selling to Smith stock of similar amount to that in respect of which the plaintiff had contracted with the jobber to pass to him the name of a purchaser upon the settling day, the broker (the plaintiff) by passing Smith's name performed his contract with the jobber, subject of course to his liability to make good to the jobber any difference there might be between the contract price and that agreed to be paid by Smith. That the contract with the jobber was thus fulfilled appears to me clear, and he had no claim or remedy whatever against the defendant, the original principal. The real truth is, when the broker (the plaintiff) sold against the defendant upon November 19, he substituted Smith as purchaser in the defendant's place, and by passing Smith's name to the jobber, the broker's contract with him

was performed. It appears to me that the plaintiff altogether fails to shew that the defendant refused or neglected to perform his contract with the plaintiff, for by the plaintiff's own wrongful act the defendant has been prevented from performing it, and consequently an action for an indemnity in this case cannot be supported.

The case of *Duncan* v. *Hill* (1) is a direct authority that there is no implied promise by a buying principal to his broker that he will indemnify him from the consequences of his own wrong.

If I had come to a contrary conclusion I should not have thought anything of the point, under the peculiar circumstances existing as to the 8000*l.* being brought into court by the defendant, that there could only have been a declaration for an indemnity and not judgment for the amount of the deficiency. For the reasons above, in my judgment the defendant is entitled to have judgment entered for him upon the plaintiff's claim for indemnity as regards the stocks which were open and not paid for upon November 10, 1896.

As to the second question, the application for a new trial raised upon the defendant's counter-claim for 25,000*l.* against the plaintiff, namely, for not assisting the defendant in carrying out the scheme of the electric railway, I am of opinion that it should be refused. The jury had to consider, first, whether such a promise was made; secondly, what was the meaning of it, if made; and thirdly, whether the plaintiff had done all that he had promised to do under the vague term "to assist." They have found that he promised to assist, and that he did so. Upon the evidence read to the Court, I can see that the jury were well warranted in this last finding, namely, that the plaintiff had performed his promise. Down to a certain period the plaintiff manifestly did assist the defendant; and it may well be that the jury thought by what he had done in the circumstances which existed that he had amply fulfilled his promise. The result is that the appeal as to entering judgment for the defendant for that part of the claim above mentioned must be allowed, and the appeal as to the new trial must be refused.

(1) L. R. 8 Ex. 242.

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RIGBY L.J. In this case the defendant Pond, acting on behalf of himself and others who formed the syndicate called the "Bloomsbury Syndicate," from time to time instructed the plaintiff, who is a stock-broker, to purchase for the syndicate stocks of the Metropolitan District Railway.

Having regard to the findings of the jury, it is not necessary to go back to any time before November 10, 1896. On that day, which was the carrying over day, the plaintiff had bought large amounts of Metropolitan District Railway stocks on the instructions of the defendant Pond for the Bloomsbury Syndicate.

Of the stock so purchased, 105,000*l.* had been or was on that day taken out of the market, that is to say, paid for by the plaintiff, partly out of money supplied to him by the defendant Pond for the syndicate, but to a large extent out of money advanced on loan by the plaintiff. The plaintiff had procured delivery to himself or his nominees of the stock taken off the market, which was thus held as security for the plaintiff's advances with interest.

On the same November 10 the plaintiff, on the instructions of the defendant Pond, carried over to the next account 35,000*l.* stock at 29⅛, and purchased for the same account at slightly different prices 10,000*l.* of the District Railway Ordinary Stock and also certain preference stock of the same railway, which need not be further mentioned, as no claim arises in respect of that stock.

The carryings over are really contracts for purchase and sale at the named price of the stocks carried over for the next account to which the stocks are carried over. The statement of the case may therefore be simplified by saying that on November 10 the plaintiff was mortgagee of the 105,000*l.* stock, and had, as broker for the syndicate, procured contracts with various dealers for the sale to the syndicate as on November 26 of ordinary stock amounting altogether to 45,000*l.* Bought-notes in respect of the purchases of the stock were sent by the plaintiff to the defendant Pond, representing the syndicate, as purchaser, but in accordance with the usage of the Stock Exchange these did not contain the names of the

dealers. At this stage the plaintiff had performed his duty as broker by entering into valid contracts with the dealers; but, not having received the purchase-money for the stocks contracted to be purchased, he was under no contract with his customer as to the delivery of them.

On November 19 the plaintiff, becoming alarmed at the state of the market, and being unable to obtain what he thought to be sufficient cover, sold for November 26 10,000*l.* of the District Stock to certain dealers, and 140,000*l.*, the residue, to Mr. Early Smith, also a dealer, intending to treat the sales as made on account of the syndicate with a view to closing his account with them at once. The defendant Pond at this time refused to treat the sales as proper sales, but repudiated all personal liability, and thereby made it clear that he did not intend personally to fulfil any of the obligations entered into by the plaintiff, whilst at the same time he refused to make known the names of the persons who made up the syndicate and were alleged by him to be solely liable.

On November 24, being the carrying over day for the end of November account, the plaintiff issued his writ in this action against the defendant Pond and the syndicate as defendants claiming 8551*l.* 0*s.* 11*d.* as a balance due from the defendants in respect of stocks and shares bought and sold by the plaintiff for the defendants at their request, and for commissions and moneys expended. The account in respect of which the said balance was claimed, in addition to items both on the credit and debit side in no way disputed, debited the defendants with the sums payable for the 45,000*l.* stock on November 26, as though they had been paid by the plaintiff for the defendants, and credited the defendants with the sums payable on the same day for the whole amount of the 150,000*l.* at the various prices for which the parts thereof were sold on the 19th for the 26th, as though they had actually been received by the plaintiff for the defendants. The plaintiff endeavoured unsuccessfully to obtain judgment under Order XIV. The defendant Pond still denied that he was a partner in the syndicate or personally liable, but this point was decided against him on an issue tried in the action, and he was then called upon to disclose the names

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of his co-partners, the other members of the syndicate, which he was unwilling to do. To avoid the necessity of doing so it was arranged that the defendant Pond should pay into court the full amount of the plaintiff's claim in the action to abide the result of it. This was done, and thenceforward the action proceeded against the defendant Pond alone, the plaintiff of course relying upon the money paid in as a sufficient ground for not proceeding against the syndicate. A defence was delivered by the defendant Pond on December 31, 1896, accompanied by a counter-claim for damages to the amount of 25,000*l.* for breach of an alleged agreement to assist the defendant in carrying out a scheme for the construction of an electric railway in connection with the Metropolitan District Railway and for accounts. The plaintiff replied on February 10, 1897, and the reply was amended on June 4, 1897. The pleadings were not relied upon at the trial of the action, and are only indirectly of importance. For the present it is only material to observe that the defence contained no charge of fraud against the plaintiff with reference to the sales of November 19, 1896, or any other matter. It did, however, set up that the sales were wrongful as to the whole, and that the damages thereby occasioned exceeded the balance claimed by the plaintiff. This amounted in my judgment to an acceptance of the way in which the plaintiff stated the case, a recognition of the view that he had purchased the whole of the 150,000*l.* stock on behalf of the syndicate, and an attempt to fix the plaintiff with the whole of the loss occasioned by the wrongful sale of the whole 150,000*l.*

The action was tried by Mathew J. with a special jury on July 21 and other days. When the evidence was closed, and before counsel for the defendant addressed the jury, the learned judge proposed to submit five questions to the jury on the claim and two on the counter-claim, stating that he would add anything that either side wished. One of the questions was modified at the suggestion of counsel for the plaintiff, and the learned judge then asked whether there was any other question, and counsel for the defendant answered that he thought not. The learned judge, addressing counsel on both sides, said: "You

agree, if any question of fact should have escaped us, the Court will deal with it subsequently: these are the questions on which we will take the opinion of the jury," and this was assented to. I mention the suggestion as to any facts which might have escaped notice only to shew that it has not been overlooked. It could not leave open any fact really covered by the questions put to the jury.

The five questions on the claim and the answers thereto were as follows: 1. Did the plaintiff agree not to sell the stock before November 26? Answer: He did. 2. Did the defendant when he employed the plaintiff as his broker, or at any other time, agree to give cover to any and what amount? Answer: There was no agreement to give cover at first, but the defendant afterwards admitted the plaintiff's right to cover. 3. Did the plaintiff agree to give the defendant notice before he closed the account? Was the notice he gave reasonable? Answer: There is no evidence of any agreement to give the defendant notice, but we consider the notice was unreasonably short. 4. Did the plaintiff in selling the stock act in good faith and with proper care and skill? Answer: No, he did not. 5. If the stock had not been disposed of to Smith, for what amount could the plaintiff have sold it? Answer: 28*l.* The questions on the counter-claim were: Did the plaintiff as broker for the defendant agree with the defendant to assist the defendant in the scheme of the electric railway? Answer: Yes. Did he fail to do so? Answer: No.

It seems to me that the questions submitted to the jury on the claim were, independently of any admission by the defendant's counsel, proper and sufficient for determining all issues by way of defence set up on behalf of the defendant. All the questions were directed to the whole sum of 150,000*l.* and were manifestly framed on the basis of the whole of the stock having been purchased for the syndicate. Questions 2, 3, and 4, however, seem to have been required only in the event of question 1 being answered in the negative. As the jury answered that question in the affirmative, it was thereby conclusively established that the sales of November 19 were wrongful sales, and the answers to the questions 2, 3, and 4 were of little or no

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importance. With reference, however, to the words "good faith" contained in question 4, and having regard to the fact that no charge of fraud had been set up in the action, I think it only fair to the plaintiff to refer to what was said by the learned judge about it on July 27 on the motion for judgment. Mr. Bigham, counsel for the plaintiff, was about to discuss the finding on the 4th question, when the learned judge said: "Just consider, Mr. Bigham; no more need be said about it than that it indicates they thought he was wanting in skill." This interpretation has never been questioned. As to question 5, it was strongly argued by the defendant's counsel in his address to the jury that, if the wrongful sales had not taken place, the price might have gone to a much higher price, even to the highest price, 34, which it had in recent times attained, and he invited them to take that view. The learned judge in his summing-up told them that, if they thought fit, they might adopt this view, but they found for 28 and no higher price.

I have thought it desirable to state at considerable length the facts shewing how the action was defended and tried, as I think them all important. What are the proper conclusions to be drawn?

The question attempted to be raised on the appeal is whether the defendant is entitled only to allowance for the damage occasioned to him by the wrongful sales of the 150,000*l.*, which in the court below was the only question raised during the trial, or whether he is to become a gainer from the wrongful sales by putting upon the broker the contracts for purchase of 45,000*l.* of the stock which turned out to be losing bargains, as they involved payment on the 26th at the rate of 29½ for stock worth on that day at most 28 only. In the particular instance the wrongful sales, so far as they were operative against the defendant, did occasion damage (as in the case hereinafter referred to, *Lacey* v. *Hill*, *Scrimgeour's Claim* (1)), but they might have been in the result advantageous, and then the effect of treating the defendant as released from the obligation to indemnify his broker would be remarkable. Suppose, for instance, the stock, instead of rising to 28, had fallen to 22.

(1) L. R. 8 Ch. 921.

In the absence of a sale the defendant would have had to pay on the 26th at the rate of 29½ for stock worth 22 only; that is to say, he would lose 7½ per cent. on the nominal value. The wrongful sales occur, and under them he gets on the 26th 25 for what is worth 22 only. So far as that transaction is concerned, he is better off by 3 per cent. than if the sales had not taken place. But, if he is entitled to deny the broker's right to indemnity, he profits to the extent of 7½ per cent. by throwing on the broker the obligation of taking up shares worth 22 at 29½, and himself getting rid of liability altogether. This does not necessarily shew that the defence now attempted to be set up by the defendant is, if admissible at this stage, unfounded in law, but, before such a conclusion can be admitted, the grounds for it must be carefully analyzed. Speaking for myself, I say that I do not think the defence, if it were well founded, admissible at this stage; but, as the questions raised are of importance, I shall not shrink from the discussion of them on the more than probable supposition that my learned brothers are right in supposing it admissible.

As regards the 105,000*l.* stock taken off the market, and in respect of which money has been advanced, it has hardly been contended that the plaintiff was not entitled to bring into account the money actually paid. At any rate it appears to me that the principle indicated in *Lacey* v. *Hill*, *Scrimgeour's Claim* (1), applies. Probably there were circumstances in that case equivalent to those which in the subsequent case of *Lacey* v. *Hill*, *Crowley's Claim* (2), were held sufficient to entitle brokers lawfully to sell; but James L.J., and (in the latter part of his judgment) Mellish L.J., seem to me to have assumed for the purposes of their decision that the sale might be wrongful, and, on that assumption, decided that the loss occasioned would be the subject of a set-off or counter-claim only. The case is not very clearly reported, and in particular the head-note is, in my opinion, inaccurate. A man cannot be justified in making a sale and yet liable in damages for doing so, and nothing of the sort was, I think, intended to be decided. When once the question as to the 105,000*l.* stock is determined

(1) L. R. 8 Ch. 921. (2) L. R. 18 Eq. 182.

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in the plaintiff's favour, it is plain that a considerable balance will be due to the plaintiff, whatever the decision may be with reference to the 45,000*l.* stock purchased on November 10.

In the following remarks I proceed to consider the case of the 45,000*l.* stock purchased for the syndicate on November 10. The broker is instructed to purchase for the next account day 45,000*l.* stock. The broker, in pursuance of these instructions, contracts with a dealer or dealers for delivery of stock amounting altogether to 45,000*l.* on November 26. The contracts are indeed contracts entered into on behalf of his principal; but, according to the rules of the Stock Exchange, they are entered into by the broker personally with the dealer or dealers personally, and the dealer at the time of making any contract knows nothing, and is not concerned to know anything, about the broker's principal. The obligation of the broker to pay on the settlement day is complete on the day of the contract (in this case November 10), and cannot of course be affected by anything which takes place subsequently between himself and his principal. A dealer, however, is not bound and cannot be required himself personally to deliver stock contracted to be sold, but will have fulfilled his contract if on the name day (in this case November 25) he procures to be supplied in accordance with the rules the name or names of any person or persons named by a member of the Stock Exchange, and ready and willing to deliver shares to the amount in the whole of the shares contracted for. In the meantime, and not improbably on the very day of entering into the contract, the dealer may make contracts with other members of the Stock Exchange for the purchase of like shares, and is entitled to substitute the vendors to him as persons to deliver in his place on the settling day the stock which they have contracted to sell to him. This operation may be repeated indefinitely, and the obligation to deliver may be split indefinitely; so that the ultimate obligation of the broker may have to be fulfilled by making payment on the settling day to, and receiving delivery on that day from, persons who until the name day are not, and in general could not be, known to him. I call attention to this to shew that there cannot be inferred any release of the dealer from his con-

tract of November 10 as was suggested. In the absence of any special contract with the customer, the broker cannot alter the day for settlement, nor can the customer without the broker's consent. It is, however, a very common thing for a broker who has made advances to a customer, or who finds himself becoming liable on the customer's account to a greater extent than he thinks desirable, to stipulate for a certain amount of cover or security, and to bargain for the right of closing his accounts with his customer on failure to provide the agreed cover. The meaning in this context of closing the accounts will be dealt with below. At present it is sufficient to notice that any such contract arises as a collateral and special contract, either by express agreement or by inference from a course of dealing, and not out of the mere relation of principal and agent.

Here the broker assumed to close the contract as against his customer by sales on the 19th. The findings of the jury make it quite clear that he had no right to do this. It is sufficient for this purpose to refer to the first finding, that he had agreed not to sell before the account day, in order to shew that, whatever the special bargain might be in other respects, a sale before the settling day would be wrongful as against the customer. On the other hand, there was no suggestion that he was bound to hold over any stock after the settling day; at any rate, there was no evidence of a bargain to that effect, and it is plain that there can be no carrying over without an agreement to which dealer (or his nominee or nominees), broker, and customer are all parties. The broker, therefore, though he could not close on the 19th, had a right which no one could take from him of closing on the 26th. What, then, was the effect of the sales?

The main contentions appear to be: (1.) That, by affecting to close the accounts by crediting the customer only with the price or prices obtained by the respective sales of the 19th, the broker refused to carry out the contract entered into on the 10th on behalf of his customer, and thereby released the customer from his obligation to indemnify him from any loss in respect thereof, or in some other way forfeited his right to indemnity. (2.) That under the doctrine of *Duncan* v. *Hill* (1)

(1) L. R. 8 Ex. 242.

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the defendant is released from liability. (3.) That the plaintiff's position may have been altered for the worse by his issuing the writ in this action before the settling day, November 26.

The first contention is equivalent in my judgment to saying that there was a rescission of the contract out of which the obligation to indemnify arises; for, if this contract remains unrescinded, I can see no ground whatever for not giving the indemnity. In order that there may be a rescission, there must be an absolute and unqualified refusal to perform by one party, or an act done which incapacitates him from performing and an election by the other party to rescind. "The rule is," said Coleridge J. in *Franklin* v. *Miller* (1), "that, in rescinding as in making a contract, both parties must concur"; and this is borne out by other decisions. Now it cannot be said that the plaintiff, as to the 45,000*l.*, had incapacitated himself from performing his contract. All that happened was that, for the purpose of regulating the accounts between himself and his customer, he entered into a contract or contracts for the sale of 45,000*l.* stock, but not the 45,000*l.* which he had contracted to purchase on behalf of the defendant Pond, for neither in one case nor the other was there a contract as to specific stock. If the District Stock had risen to a price which would have made it worth the while of the defendant to insist upon delivery of the 45,000*l.* on the 26th, the plaintiff might still have procured delivery to him, when duly called upon, of stock to that amount. Was there, then, an unqualified refusal to perform the contract? Bearing in mind that the contract was to purchase for the defendant 45,000*l.* stock according to the rules of the Stock Exchange, I cannot see how in point of law what the plaintiff actually did can be treated as an unqualified refusal to perform his contract as broker. He in fact fulfilled that contract by the purchases on the 10th, and was not bound to do anything more until the price was duly tendered to him by his customer—an event which never happened. What the plaintiff did was to rely upon a supposed right to sell out against the defendant, not the defendant's stock, as before pointed out, but an equivalent amount of stock, and to treat the price obtained on that

(1) (1836) 4 Ad. & E. 599.

sale as all that the defendant was entitled to be credited with in respect of the 45,000*l.* agreed to be purchased for him. He founded this supposed right, not on anything contained in or to be implied from the actual mandate to purchase the stock given and acted upon on November 10, but on a special contract which he set up as to cover and an alleged breach of that contract by the defendant. So far from repudiating his obligations with reference to the 45,000*l.*, he throughout, by insisting on his right to be indemnified by payment of the sums which he was bound to pay for the defendant, shews his intention to treat the contract as a valid and subsisting contract. The case appears to me to resemble in principle an unsuccessful attempt to prove that a contract has been satisfied or performed, and to be altogether remote from an unqualified refusal to perform. At most, his conduct with reference to the sale of November 19 could only be evidence along with all other circumstances of a refusal to perform his contract of November 10. If the point had been intended to be raised, it should have been raised at the trial. So far as it involves a question of fact, it ought to have been raised when the learned judge formulated the questions which he proposed to submit to the jury, and called upon counsel on both sides to say whether or not they were sufficient. Of course no such issue was raised, as it would have been inconsistent with the case then set up for the defendant. There would also have arisen the further question—also, I think, a question of fact—whether the defendant had elected to rescind and had rescinded the contract. The defendant did not say, "I shall treat your action with reference to the sale of the 45,000*l.* as a rescission of the contract under which I am bound to indemnify you." Down to the issuing of the writ he said in effect (and he proved to be right in saying), "I shall treat that action of yours as wrongful, so far as my principals are concerned, since you have no right to sell as against them." Throughout his evidence the defendant Pond never suggests that he elected to rescind, but leaves it clearly to be inferred that the only reason why he did not insist upon the rights of himself and his principals as to the 45,000*l.* was that he could find no broker to support him. The case as to the

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rescission by the defendant would have been hopeless, as the evidence was all one way. On the above grounds, I do not think there was any rescission of the original contract.

The case appears to me to be analogous to and to come within the principle of *Lacey* v. *Hill*, *Scrimgeour's Claim* (1), already referred to, and the case of *Francis* v. *Baker*. (2) That case was decided upon demurrer, and some technical points of pleading were involved, but a clear principle was laid down in it. The plaintiff, a broker, sued the defendant, his customer, for 100*l*. for money paid for the use of the defendant at his request. That was for indemnity. The defendant pleaded that the money was paid for the purchase of railway shares by the plaintiff, that the plaintiff had received the certificates for the shares and afterwards before suit converted them to his own use, whereby the shares and certificates became lost to the defendant. If the plea were proved, it was clear that the plaintiff had incapacitated himself from performing the whole of his duty as broker, which under the circumstances included an obligation to deliver. It was however held that the plea disclosed no defence to the action, but only a ground for a cross-action, being founded not on any breach of the contract which gave the right to indemnity, but on a subsequent independent tort. I do not see that in any other than a technical sense there is a difference for the purposes of this case between a claim for indemnity in respect of money already paid and one for indemnity against a liability already undertaken; or between a defence grounded on an independent tort and one founded on the breach of a collateral and distinct contract.

2. The second contention is that the case is governed by *Duncan* v. *Hill* (3), a decision in the Exchequer Chamber. There a claim for indemnity was made by an insolvent broker on behalf of his creditors against a customer for money paid by the broker for the use of the defendant (which was not disputed in the Exchequer Chamber) and for a further amount which the plaintiff had to pay to the dealer on a closing of the

(1) L. R. 8 Ch. 921. (2) (1839) 10 Ad. & E. 642.
(3) L. R. 8 Ex. 242.

account which became necessary under the Stock Exchange rules on the broker being declared a defaulter. The rules, which were absolutely binding as between the broker and dealer and all members of the Stock Exchange, prescribed a closing of the account as on and at the prices of the day of the broker being declared a defaulter. The prices of that day were independently of the usage irrelevant to the contract authorized to be made, and in the Exchequer Chamber it was held that this particular claim for indemnity arose by reason of the broker's own default, and could not therefore be maintained by him. It was sought by the broker to make the customer liable to indemnify him against a loss which he had himself brought about. The decision did not touch the question of the dealer's right against the customer, as to which see *Hartas* v. *Ribbons*. (1) Here the plaintiff's claim for indemnity does in my judgment quite plainly arise out of the original contract, and not out of the attempted closing of the accounts by the wrongful sale, which transaction is only relevant in so far as it may be available as a defence or as a separate ground for damages. Further, the attempted closing of the accounts by the sales of November 19 is entirely different from that closing which in *Duncan* v. *Hill* (2) was rendered imperative both upon broker and dealer. Here there was only an attempt to put in force a supposed right which turned out not to exist. It had no reference to and could not alter the position of the broker to the dealers or to the unknown persons who on the name day would be found to have taken the place of the dealers as to all rights and liabilities under the contracts of November 10.

3. As to the effect of the issuing of the writ on November 24, i.e., two days before the settlement day, as the plaintiff had not then paid for the defendant the money payable on the 26th, he could not properly sue for that part of his claim which related to that stock as for money due. But the broker's liability to pay for the 45,000*l.* stock was then imminent. The defendant Pond repudiated his own liability to pay, and refused to give the names of the persons alleged by him to be the only contracting parties, and therefore the broker was then entitled,

(1) 22 Q. B. D. 254. (2) L. R. 8 Ex. 242.

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in accordance with the authorities collected and explained by Wright J. in *Wolmershausen* v. *Gullick* (1), to bring his action for indemnity, unless of course he had forfeited that right by his wrongful sales on November 19. That he intended to waive any such right is negatived by the fact that he actually makes the claim in substance though not in the technically correct form. His application for judgment under Order XIV. was of course wrong, but not more wrong than the defendant Pond's contention that he was under no liability at all to the plaintiff. The defence, which was not delivered until December 31, did set up that there was nothing due to the plaintiff, but that was by reason of the claim for damages to a larger amount than the balance claimed by the plaintiff. It in no way suggested that there had been a rescission of the contract to indemnify or a forfeiture of the right to be indemnified. If it had done so, the plaintiff might have amended so as to put himself technically right.

If, on the carrying over day, November 24, or the name day, November 25, defendant had procured a broker to take over for him the 45,000*l*., I think that the plaintiff would have been bound to accept the offer, and that the offer would have been accepted by the plaintiff, as it would have been to his interest to accept it. Not till it had been refused would there have been any failure of duty by the plaintiff in respect of the contracts of November 10 as distinguished from the wrongful sales. The defendant, as before pointed out, attributes his failure to take any steps to the impossibility of finding a broker to support him; but it could have been no advantage to him to take this course, as he would thus be purchasing for 29½ stock for which he could have obtained according to the finding of the jury not more than 28. I have referred to the shorthand notes of the arguments and evidence in the court below, and I can find nothing down to the giving of the verdict by the jury which ought to have conveyed, either to the learned judge or to the plaintiff's counsel, that the defendant intended to set up the defence that the contract of November 10 between the plaintiff and defendant had been rescinded or the right to

(1) [1893] 2 Ch. 514.

indemnity forfeited. If I am right in my opinion above expressed, that rescission was a matter depending upon facts which ought to have been left to the jury, it is not permissible for the defendant to ask that judgment should be entered for him on an issue which was never properly raised in the court below. But the case does not really end there. By his pleading, and, what is more important, by the whole conduct of his case, the defendant treats the 45,000*l.* stock as belonging to him, and founds upon the wrongful sale of it a claim for damages which, if the jury had taken his view as to amount, would have wiped out the whole of the balance claimed by the plaintiff. Such a claim necessarily involved payment by him for the 45,000*l.* at the prices actually paid for it by the plaintiff, as the defendant could not at once approbate and reprobate. He could not, after taking his chance with the jury of getting larger damages by reason of his being the owner of the 45,000*l.* stock, turn round and say that he was not such owner and not bound to allow in account the purchase price. In the result I think that the learned judge was right in the conclusion at which he arrived. He was entitled and indeed bound to find that the plaintiff had at the time of issuing his writ, or at least when the defendant elected to treat as his own the 45,000*l.* stock, a right to be indemnified in respect of the contracts for purchase of the 45,000*l.* stock, or, what is the same thing, to be paid for the stock on the ownership of which the defendant founded a great part of his claim for damages. There being in court the money paid in as a security for the satisfaction of the plaintiff's claim, it was but right and proper to direct the amount of the plaintiff's real claim, after allowing for the damage done to the defendant, to be paid out of that money.

As to so much of the appeal as relates to the defendant's counter-claim, the findings of the jury are conclusive against the appellant unless set aside, and I agree that there has been no ground shewn for interfering with them.

COLLINS L.J. This is an action brought by Mr. Ellis, a stock-broker, against Mr. Pond (I leave out the Bloomsbury Syndicate) to recover an indemnity in respect of moneys

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expended and losses incurred by him acting as broker for the defendant on the Stock Exchange to the extent of 8551*l.* 0*s.* 11*d.* The facts material to the points before us may be very shortly stated.

The defendant Pond was the author of a project connected with the Metropolitan District Railway which rendered it important to him to get command of a large interest in the stock of that company. He employed the plaintiff as broker to effect purchases of stock to the nominal value of about 140,000*l.*, some of which the plaintiff had by arrangement with the defendant actually paid for and taken off the market, and held as security for his advances with interest on November 10, 1896. On that day all the stock except an amount to about the nominal value of 35,000*l.* had been so dealt with, i.e., taken off the market by the plaintiff, and the residue, 35,000*l.*, still remained in contract, i.e., it had still to be delivered by the seller and paid for by the defendant or his broker. On the settlement of November 10, the 35,000*l.* stock was by the defendant's instructions carried over, and, as appears from the finding of the jury hereafter mentioned, the plaintiff for consideration agreed that the whole 140,000*l.* should not be sold before the next account, namely, the 26th. There was also a further amount of 10,000*l.* of stock bought for delivery on that day. Before the day of settlement arrived, namely, on November 18, the plaintiff wrote to the defendant, enclosing an account shewing a difference against him of 5000*l.*, and demanding instructions with reference to closing the account by 11 o'clock the next day, failing which he would be obliged to take the matter into his own hands and realize the stock. The defendant declined to give such instructions, and accordingly on November 19, six days before the account day, the plaintiff sold out all the stock, and on November 24, still before the account day, issued the writ in this action, claiming the difference between the price realized on the sale and the price at which the stock had been carried over on November 10, and took proceedings under Order XIV. to enforce his claim. Leave to defend was obtained, and the action was tried before Mathew J. and a special jury, who answered certain questions put to them

by the learned judge, who upon their answers gave judgment for the plaintiff for 415*l.*, and against a counter-claim set up by the defendant; and it is against this judgment that the defendant now appeals. I have passed lightly over the facts, as all that is material to the decision of the case has been ascertained by the findings of the jury, which on this part of the case are not questioned. The jury found that the plaintiff agreed not to sell the stock before November 26: that there was no evidence of any agreement by the plaintiff to give the defendant notice before he closed the account, but that they considered that the notice given was unreasonably short: and that the plaintiff in selling the stock did not act in good faith and with proper care and skill. They further found that, if the stock had not been disposed of to Smith, i.e., the purchaser of the 19th, the price at which the plaintiff could have disposed of it would have been 28. The sale to Smith had been at 25.

On these findings the learned judge gave judgment for the plaintiff in respect of all the stock, but credited the defendant as upon a sale at 28 instead of 25, as claimed by the plaintiff. The defendant contends that the plaintiff cannot claim to be indemnified against the consequences of an unauthorized and wrongful sale, and that, inasmuch as the whole damnification in respect of which the plaintiff sues is the direct result of such sale, he has no claim in this action.

I think the defendant is wrong in respect of that part of the stock which had been paid for and taken off the market by the plaintiff, and right as to the residue, 35,000*l.* and 10,000*l.*, which was still undelivered, and which he was not under any contract to take or pay for before November 26. Both points appear to me to admit of no doubt on principle, but I think they are both as clearly covered by authority.

I will deal first with that part of the case which was most debated in argument, namely, the claim in respect of the 35,000*l.* and 10,000*l.* stock. I think it is only necessary to analyze the cause of action to see that on the findings of the jury the plaintiff failed to prove his case. He cannot support his claim without proving a failure by the defendant to perform his contract whereby the plaintiff was damnified through being

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compelled to pay or made liable to pay the amount claimed. But, inasmuch as before the time for performance he sold the stocks, and they were never offered to the defendant at the proper time for performance, there was no failure by the defendant to perform any part of his obligation. The plaintiff has failed to prove a breach. Had the case been one to be decided upon common law principles, apart from the custom of the Stock Exchange, it is quite clear that he could not treat the defendant as having broken his contract before the time for performance, unless he could bring himself within the principle of *Hochster* v. *De la Tour* (1) and *Frost* v. *Knight*. (2) Under the custom of the Stock Exchange probably something short of what but for such custom would be requisite to justify him in treating the contract as broken before the time for performance might justify a sale; but this point in either view is settled by the findings of the jury, which shew that the sale was wrongful. His whole damnification, for anything that appears to the contrary—and the burden is upon him—was the consequence of his own unjustifiable act in selling without authority express or implied. If the defendant had taken up the stock on the 26th, the plaintiff would not have been damnified at all. I asked Mr. Asquith during the argument whether, if the case had been tried on the day of the writ and there had been no counter-claim, the question for the jury would not have been, Was the sale justified? Mr. Asquith, with perfect logic but some boldness, answered that there would have been no question for the jury, but that the duty of the judge would have been to give judgment for the plaintiff: in other words, whether the plaintiff was justified or not in anticipating the time for performance and measuring his damages accordingly, his rights were the same. I think the simple ground which I have stated, namely, that the plaintiff did not prove, and, indeed, put it out of his power to prove, any breach by the defendant is decisive of the case.

But, as a great point was made by the plaintiff's counsel that the act of the broker in selling could not affect his right to the indemnity claimed unless he had thereby debarred the jobber from claiming performance of his contract, I will add that I

(1) 2 E. & B. 678. (2) L. R. 7 Ex. 111.

think the inference is inevitable that by the sale "to close" he did so debar the jobber. Indeed it would be absurd to suppose that the defendant should be liable at the same time to indemnify the plaintiff as upon a failure to perform his contract before the time for performance arrived, and be liable to have it enforced against him by the jobber afterwards. The plaintiff's claim to indemnity must be that he has settled with the jobber or become liable to pay him the amount in question in discharge of his liability to him, and therefore of the right of the jobber (if any) against the defendant. It was admitted that this would be so had the plaintiff actually paid the jobber, which in his proceedings under Order XIV. he purported to have done; but I think it is equally so if he had ascertained his liability at that amount by means of a sale. The object of a sale "to close" is to close the whole transaction with the jobber as well as with the customer; and, if the name of a new vendee is given by the broker and accepted by the jobber, the latter will perform his contract by delivering to the new vendee: see the effect of the custom of the Stock Exchange explained by Blackburn J. in *Maxted* v. *Paine* (1), and see also *Nickalls* v. *Merry*. (2) As before pointed out, what he threatened to do by his letter of the 18th, and what he in fact purported to do on the 19th, was to sell the defendant's stock, and, though it is true that there was no specific stock applicable to the defendant's contract, what he in fact did by such a sale was to pass to another person his right to claim that amount of stock from the jobber and to absolve the jobber from delivering to him. He would have had to make a fresh purchase had he wished afterwards to deliver to the defendant. The act of the broker therefore in "selling to close" was equivalent to a repudiation both for himself and the jobber of any intention to perform the contract for delivery on the 26th. It is said the defendant claimed nevertheless to hold them to their contract by his letter refusing to be bound by the sale; but the only effect of this would have been possibly to have kept alive the right of the plaintiff to recur to the contract and claim payment on the proper day from the defendant, averring his own readiness and

(1) (1871) L. R. 6 Ex. 132. (2) (1875) L. R. 7 H. L. 530.

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willingness to perform on his part, and abandoning that part of his claim in the present action with which I am now dealing. He has not done so, and was not in a position to do so.

But I think the case is concluded by authority. *Duncan* v. *Hill* (1) seems to me to be directly in point. There the brokers had on the account of July 15 paid differences for the defendant to the extent of 1688*l*., and carried over his stocks to the next account—namely, July 29. On the 18th, by reason of the defendant and others not having repaid them the sums due on the account of July 15, the brokers were declared defaulters, and under a rule of the Stock Exchange all their accounts were closed at a price shewing a heavy additional difference against the defendant. The action was brought to recover this sum as well as the 1688*l*. already paid. It was held in the Exchequer Chamber that the latter sum, which indeed was not disputed, but not the former, could be recovered. "It must be admitted," says Blackburn J. in delivering the judgment of the Court, "that for any loss incurred by the agent by reason of his having entered into such contracts according to such rules, unless they be wholly unreasonable, and where the loss is without any personal default of his own, he is entitled to be indemnified by his principal upon an implied contract to that effect. But it is argued that, where the agent, as in this case, is subjected to loss, not by reason of his having entered into the contracts into which he was authorized to enter by his principal, but by reason of a default of his own—that is to say, as in this case, by reason of his insolvency, brought on by want of means to meet his other primary obligations—it cannot be said that he has suffered loss by reason of his having entered into the contracts made by him on behalf of his principal, and consequently there is no promise which can be implied on the part of his principal to indemnify him; and in the present cases there certainly was no express promise to this effect. These allegations, both as to fact and law, seem to us to be correct. There was no failure by the defendants in any part of their undertakings. . . . . The plaintiffs' insolvency was, so far as regards the defendants, entirely the result of their own default."

(1) L. R. 8 Ex. 242.

Substitute unjustifiable sale for sale enforced in consequence of the plaintiff's default, and every word of this judgment applies to the present case. The sale by the now plaintiff was no more the result of his undertaking the defendant's agency than was the sale imposed by the Stock Exchange in the case cited. Tried by the standard of the necessary averments in an action for breach of a contract to indemnify, which will be found set out in the pleadings in that case, it will be found that here as there the plaintiff must fail, and for the same reasons: he cannot trace his damage to the breach of any contract by the defendant. The decision in *Lacey* v. *Hill, Crowley's Claim* (1), points the distinction which I have sought to explain. There, as in *Duncan* v. *Hill* (2), the brokers had been declared defaulters, and their transactions had been compulsorily closed by sale under the rules of the Exchange; but Sir George Jessel being of opinion that the relations between them and their principal, Sir R. Harvey, were such as to justify the sale had it been carried out by themselves, held that they were entitled to recover the loss thereby ascertained. "The first question I have to decide," says Sir George Jessel, "is, Was such a sale authorized?" In other words, the brokers under the custom of the Stock Exchange were justified in treating their principal as having renounced the contract.

As to that part of the stock which the plaintiff had actually taken and paid for, his right to be recouped had actually attached, and was not undone or divested by his subsequent breach of his contract to carry over. Just as in the case of the 1688*l.* in *Duncan* v. *Hill* (2), these liabilities had either been actually paid or finally attached by reason of the plaintiff's due performance of his duty as agent, and no subsequent default of the agent could annul his vested right of action in respect of them; it could only give rise to cross-action or counter-claim. The point is concluded by *Lacey* v. *Hill, Scrimgeour's Claim.* (3)

But it is said that the defendant, by claiming damages on the ground that but for the plaintiff's conduct in selling as he did the price of the stock would have risen to over 30 on the

(1) L. R. 18 Eq. 182. (2) L. R. 8 Ex. 242.
(3) L. R. 8 Ch. 921.

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settling day, is debarred from setting up that the broker lost his right to indemnity. It is said that this is to approbate and reprobate. But there is no inconsistency in asserting that the sale was wrongful, and so gave no right to indemnity, and in addition claiming damages for such wrongful sale followed by failure to deliver at the contract time, when but for such sale the market price would have been far above the contract price. The damages would, of course, have to be assessed by reference to what he would have had to pay if the contract had been performed.

It is further said that the point argued before us was not taken at the trial; but the facts which raise it are stated as matter of defence, and the main issue fought at the trial was whether the sale was justified. It clearly was taken on further consideration, and arises upon the findings of the jury, and I think we are bound to decide it. Though the case was tried without regard to the pleadings, I think it is not an unmixed advantage that the issues should not be formulated at the outset of the case. Had the plaintiff been compelled to formulate his claim, as he must have done under a stricter system, at the outset of his case, the weak spot might have been apparent before he reached the Court of Appeal.

As regards the contention that the second finding of the jury on the counter-claim is against the weight of evidence, I see no ground for interfering with the verdict.

*Appeal allowed.*

Solicitors for plaintiff: *Rooper & Whateley.*

Solicitors for defendants: *Hores, Pattison & Bathurst.*

E. L.

[IN THE COURT OF APPEAL.]

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1898
*Jan.* 26.

## WOOD, APPELLANT *v.* THE WIDNES CORPORATION, RESPONDENTS.

*Local Government — Local Authority — Powers — Power to require sufficient Water-closet to be provided—Resolution requiring Adoption of Particular System—Notice in accordance with General Resolution—Invalidity—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 36.

Sect. 36 of the Public Health Act, 1875, which empowers a local authority to give notice requiring the owner of a house to provide a sufficient water-closet, earth-closet, or privy, and in case of non-compliance empowers the local authority to do the necessary works and recover the expenses, does not empower such authority to enforce a general resolution that in all such cases within their jurisdiction a particular system shall be adopted; but they are bound to exercise their discretion in each particular case, and consequently a notice in accordance with the general resolution and requiring compliance with its provisions is invalid.

APPEAL from a judgment of the Divisional Court, reported [1897] 2 Q. B. 357, on a case stated by justices.

The facts, so far as material, were as follows:—

The appellant was the owner of certain houses, 52 to 68, Terrace Road, in the borough of Widnes.

The respondents were the local authority for the borough.

On February 12, 1895, the respondents confirmed a resolution of their Health Committee in the following terms:—

"Resolved, that in all future cases of nuisances requiring the reconstruction of privies and ashpits the local authority of this borough do as far as practicable order that such privies and ashpits be converted into the waste water-closet system, or into such other water-closet system as the local authority may from time to time approve, and that the Highway, &c., Committee be requested to take such steps for the adoption of the first-named system generally throughout the borough."

In March, 1895, the respondents' sanitary inspector served on the appellant a notice, stating that there was a nuisance at 52 to 68, Terrace Road, caused by the state of the privies, and

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requiring that they be converted into water-closets (either slop, waste, or cistern) to abate the nuisance.

The notice not having been complied with, the inspector reported the matter to the respondents.

On April 9, 1895, the respondents confirmed a resolution of their Health Committee, by which (after reciting the existence of the alleged nuisance) it was resolved that the "local authority do by written notice require the owner or occupier of each of the said houses to provide a sufficient privy and ashpit furnished as aforesaid upon the waste water-closet system approved by the corporation."

The appellant was accordingly served on April 23, 1895, with a notice as follows: "It appearing to the mayor, aldermen, and burgesses of the borough of Widnes, upon the report of their surveyor and inspector of nuisances, that the following houses, viz., numbered 52 to 88 inclusive, Terrace Road, in the said borough, are each without a sufficient privy and ashpit furnished with proper doors and coverings, the said mayor, aldermen, and burgesses do hereby require you to provide for the said houses within a period of one month from the service of this notice a sufficient privy and ashpit furnished as aforesaid on the waste water-closet system in accordance with plans and specifications, which may be seen at the office of the borough surveyor, Town Hall, Widnes. If this notice be not complied with within the time aforesaid, the said mayor, aldermen, and burgesses, will do the work hereby required to be done, and will recover in a summary manner from you the expenses incurred by them in so doing."

By a clerical error the houses were described in the notice as numbered 52 to 88 instead of 52 to 68.

This notice not having been complied with, the respondents did the work, and summoned the appellant, to recover as private improvement expenses, the amount of the first instalment of such expenses.

The justices made an order for payment.

The questions for the opinion of the Court were: Whether the resolution of February 12, 1895, was valid, and if not, whether it invalidated the subsequent proceedings; and whether

the notice served on the defendant on April 23, 1895, was a valid notice under s. 36 of the Public Health Act, 1875.

On appeal the Divisional Court (Lawrance and Ridley JJ.) gave judgment for the appellant. (1)

The respondents appealed.

*Macmorran, Q.C.* (with him *McCall, Q.C.*, and *Bonsey*), for the respondents, in support of the appeal. There is no question but that the existing arrangements were insufficient, and under those circumstances the respondents had power to order what should be substituted: *St. Luke's Vestry* v. *Lewis*. (2) The justices have no power to review the determination of the authority: *Hargreaves* v. *Taylor* (3); but they must determine whether a valid notice has been given, and the order they made shews that they were satisfied as to this. The inference drawn by the Divisional Court, that the notice was intended to carry out the general scheme and was not directed to the individual case was inconsistent with the order made by the justices. There was a report of the borough surveyor on this particular case, and on that report the respondents were satisfied and made the order. That distinguishes this case from *Tinkler* v. *Wandsworth Board of Works* (4), where it was held that the board was bound to exercise its discretion in each case. The appellant did nothing to comply with the notice; had he done anything the case would been different. The respondents would have had in that case to consider whether what he had done was sufficient, but as he did nothing they were entitled to adopt what in their opinion was the most efficient system.

*C. A. Russell, Q.C.*, and *Rylands*, for the appellant. It was impossible to treat any part of the notice as surplusage. The only mode of complying with it would have been by putting up the kind of closet required by the respondents. The notice cannot be good, because if it were an authority would be able to enforce a general scheme without exercising, as it should do, discretion in each case. The objections to the notice are that

(1) [1897] 2 Q. B. 357.
(2) (1862) 1 B. & S. 865.
(3) (1863) 3 B. & S. 613.
(4) (1858) 2 De G. & J. 261.

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the Act does not require that any specific type of closet should be used, but only an effective one, and that the numbers of the houses are wrongly set out in it.

*Macmorran, Q.C.*, in reply. There has never been any allegation that the appellant was misled by the mistake as to the numbering of the houses, which were rightly named in the first notice.

LORD HALSBURY L.C. I confess when the case was opened I was under a misapprehension as to what it was intended to argue, which I thought was to be whether there was power in a local authority to insist by a general resolution on a particular scheme. It has been admitted at the bar that no such right exists, but that the authority must exercise a discretion in each case that is brought before it, their judgment in each case being subject in some respects to appeal to the Local Government Board.

The only question we have to determine in this case is whether on the facts the respondents did or did not comply with the requirements of the statute, and give to the proprietor the opportunity of determining what particular form of accommodation he would adopt, subject to the power of the authority to insist that whatever form he adopted must be efficient.

The case presents some difficulties, for, except as a matter of inference, there is some difficulty in arriving at what is the real conclusion of fact. There is no question of law to be determined. Looking at all the facts, I have come to the conclusion that there was an effort on the part of the local authority, without applying to each particular case the discretion which they were bound to apply, to enforce over their district one system which they considered desirable. It was, I have said, conceded that they must form their judgment in each case that is brought before them; and it cannot be denied that the Act intended that there should be an adequate notice given to the person called upon to fulfil the statutory duty of providing sufficient accommodation of the character in question in this case. I have come, therefore, to the conclusion that

the judgment of the Court below must be affirmed, for I find it impossible to look at the dates of the various resolutions and notices without coming to the conclusion that it was the intention of the respondents to enforce a particular scheme of sanitation without reference to the exigencies in any particular case, and that the notice was intended to carry out that view. The notice consequently was not one authorized by the statute. I think there is no question before us as to the error in the number of the houses, for if that had been insisted on it would have been necessary to shew that the person who received it was misled thereby. The important matter is that the notice required by s. 36 of the statute, that the owner or occupier shall "provide a sufficient water-closet, earth-closet, or privy," was not given, but a notice requiring compliance with a general scheme. The counsel for the respondents admitted that unless he could shew that was only an intimation of what would satisfy the respondents it would not be a compliance with the statute; and with this I entirely agree. If there had been a note to the notice served on the appellant to the effect that it might be convenient to the owner or occupier to know that a particular form of closet would satisfy the requirements of the corporation, there would have been no harm in it; but had the notice gone on to say that no other form of closet would be satisfactory, it would have been bad. This case is still worse, because it is an order to adopt the particular form of closet approved by the authority, and an intimation that not doing so would be a default and would be followed by particular consequences. It is impossible to contend that there was a proper discrimination in the particular case before the respondents, and there was no sufficient notice within the statute to give rise to the consequences insisted upon—that the corporation would do the work themselves and charge the owner or occupier with the expenses thereof. For these reasons I am of opinion that the appeal ought to be dismissed.

A. L. SMITH L.J. I agree with the Divisional Court that this was an attempt to enforce a general scheme so that where there were defective closets they should be altered to others of

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a particular kind. When once that question of fact is arrived at the judgment appealed against must stand. There is another ground upon which it can be supported—that this notice was one that ordered the provision of closets according to a particular plan to be found at the board room of the respondents, and intimated that if the work was not done in accordance with that plan then the authority would themselves do the work, and charge the appellant with the expense. Supposing that the appellant did not like the plan approved by the respondents, but desired to put up water-closets of the latest type, his doing this would not have been a compliance with the notice; and on this ground I think the notice was bad, because it gave the appellant no option to put up, as required by the statute, sufficient closets.

COLLINS L.J. I am of the same opinion.

*Appeal dismissed.*

Solicitors for appellant: *Alfred Grundy, Son & Co., Manchester.*

Solicitors for respondents: *Sharpe, Parker, Pritchards & Barham, for H. S. Oppenheim, Town Clerk of Widnes.*

A. M.

## BENNETT *v.* SLATER AND ANOTHER.

1898
*Jan.* 26.

*Friendly Society—Nomination by Member—Revocation by Subsequent Will—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 15, *sub-s.* 3.

A nomination made by a member of a friendly society under s. 15, sub-s. 3, of the Friendly Societies Act, 1875, and in compliance with the rules of the society, may be revoked by a subsequent will of the nominator not communicated to the society during the lifetime of the testator.

INTERPLEADER ISSUE tried before Mathew J. without a jury. The facts, which were admitted, were in substance as follows.

The plaintiff was the daughter of William May, deceased; the defendants were the executors of his will. In 1864 the testator effected a policy of insurance for 100*l.* upon his own life in the Royal Liver Friendly Society, a society registered, or deemed to be registered, under the Friendly Societies Acts. On November 14, 1889, the testator, acting under the rules of the society, made a nomination in writing under s. 15 of the Friendly Societies Act, 1875, in favour of the plaintiff; by it he nominated her to receive from the society the sum of 100*l.* at his death, and directed her out of such sum to provide for his decent interment. On November 7, 1895, the testator made a will, of which the defendants were the executors, which in substance directed that after payment of funeral and testamentary expenses and debts, the residue should be equally divided between two grandchildren. On October 29, 1896, the testator died, and on March 9, 1897, his will was duly proved by the defendants, and the probate was sent to the society for registration. Meanwhile the plaintiff had claimed the money from the society under the nomination, and had given written notice to the society that she objected to the money being paid over to the executors. All attempts at settlement having failed, the plaintiff, in September, 1897, issued a writ against the society to recover 100*l.*, and the society interpleaded, and paid the money into court, less certain admitted deductions. At the death of the testator the sum due under the policy, including

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accretions, was 104*l.*; the total value of his estate, including the policy, was 117*l.*; the debts and funeral expenses amounted to 33*l.* (1)

*H. Burrows*, for the plaintiff. The nomination was not revoked by the subsequent will. Under s. 15, sub-s. 3, of the Act of 1875 a nomination can only be revoked by a writing under the hand of the member; a will is not such a writing as is contemplated by the section, for a nomination is not a testamentary document, and is not affected by the law as to wills. Even assuming that a subsequent will could amount to a revocation of a nomination, the provisions of the section requiring the revocation to be "similarly delivered or sent" have not been complied with; the will should have been sent or exhibited to the society during the testator's life.

*Bonsey*, for the defendants. The nomination was not a gift of the money; it was revocable by will, and was in fact so

(1) By 38 & 39 Vict. c. 60 (The Friendly Societies Act, 1875), s. 15, sub-s. 3, "A member of a society (other than a benevolent society or working men's club), not being under the age of sixteen years, may, by writing under his hand delivered at or sent to the registered office of the society, nominate any person, not being an officer or servant of the society, to whom any moneys payable by the society on the death of such member, not exceeding fifty pounds, shall be paid at his decease, and may from time to time revoke or vary such nomination by a writing under his hand similarly delivered or sent; and on receiving satisfactory proof of the death of a nominator, the society shall pay to the nominee the amount due to the deceased member, not exceeding the sum aforesaid."

By 46 & 47 Vict. c. 47 (The Provident Nominations and Small Intestacies Act, 1883), s. 3, the sum of one hundred pounds was substituted for fifty pounds in the above section.

[The Friendly Societies Act, 1875, and other Acts relating to friendly societies were repealed and in substance re-enacted by the Friendly Societies Act, 1896, which came into operation on January 1, 1897.]

By rule 86 of the rules of the Royal Liver Friendly Society, "The secretary shall keep a book in which any member may nominate, in writing, the person to whom the money assured by him, not exceeding £100, shall be paid on his decease, such person not being an officer or servant of the society, unless such officer or servant is the husband, wife, father, mother, child, brother, sister, nephew or niece of the nominator. Any member may revoke such nomination by a written notice to that effect, signed by himself, and it shall be the duty of the secretary to see the nomination erased. The member to pay 3*d.* to the management fund for each nomination or revocation."

revoked. The provisions of s. 15, sub-s. 3, are applicable only to a revocation of a nomination during the lifetime of the nominator; they do not affect its revocation by a will, which can only speak from the death. The assets are insufficient to pay the debts and funeral expenses without recourse to this sum, and the plaintiff cannot be in a better position than a legatee, who would only be entitled to the money if the other assets were sufficient. In s. 25, sub-s. 2, of the Industrial and Provident Societies Act, 1893, it is expressly enacted that a nomination is not to be revocable or variable by the will of the nominator, but no such provision has been introduced into any of the Friendly Societies Acts. The provisions as to nominations are not applicable to the present case, where the amount due under the policy was over 100*l*. [He cited *Ashby* v. *Costin* (1), and also referred to s. 9 of the Provident Nominations and Small Intestacies Act, 1883.]

*H. Burrows*, in reply.

MATHEW J. I am of opinion that the defendants are entitled to my judgment. The question for determination is shortly this—whether a nomination made under s. 15, sub-s. 3, of the Friendly Societies Act, 1875, and in compliance with the rules of the particular society, was revoked by a subsequent will not communicated to the society during the testator's life; I think that it was so revoked. A nomination is not a will, nor is it in the nature of a will; neither is it a gift to the nominee. The object of the Legislature in enacting the sub-section in question was to enable the members of friendly societies to make a disposition of their property up to a certain amount without the trouble and formality attaching to the making of a will, and to enable the nominee after the death of the nominator to receive the money without having to obtain letters of administration. In the present case we start with a valid nomination to the plaintiff; some years subsequently to this a will was made by the nominator by which (to put it shortly) his executors became entitled to all his property,

(1) (1888) 21 Q. B. D. 401.

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subject to payment of his debts. A further fact to be noticed is that the testator's debts could not be wholly discharged without having recourse to the money due from the society. It was contended for the plaintiff that the nomination was not revocable by will, and that it had not in fact been revoked. It cannot be successfully contended that the nomination was not revocable at all, for the statute itself makes provision as to the revocation of a nomination, and I see no reason for holding that a subsequent will cannot operate as a revocation of a prior nomination. But it was further contended that, even if a will could so operate, the proper steps were not taken in the present case to bring the revocation, that is, the will, to the notice of the society. It was said that the proper mode of procedure was to produce the original will to the society during the life-time of the testator. I cannot, however, assent to this view; I think that the proper course was to produce the probate to the society, as was in fact done in the present case. There must, therefore, be judgment for the defendants.

*Judgment for defendants.*

Solicitors for plaintiff: *Hyde, Tandy, Mahon & Sayer.*
Solicitors for defendants: *Letts Brothers.*

W. J. B.

[IN THE COURT OF APPEAL.]

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*Feb. 3.*

## LLEWELLYN *v.* VALE OF GLAMORGAN RAILWAY COMPANY.

*Railway—Interference with Road—Penalty for not substituting sufficient Road—Road belonging to Different Owners—Right of Owner of Part to Sue for Penalty—Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 53, 54.

By s. 53 of the Railways Clauses Act, 1845, if a railway company, in the exercise of their powers, find it necessary to cut through, raise, sink, or use any part of any road, either public or private, so as to render it impassable or dangerous, they shall, before commencing such operations, cause a sufficient road to be made instead of the road to be interfered with; and by s. 54 they are, in default of so doing, liable to a penalty which, in the case of a private road, shall be paid "to the owner thereof":—

*Held*, that the owner of the soil of any part of that portion of a private road which has been interfered with may sue to recover the penalty, but that only one such penalty is recoverable from the railway company.

APPEAL from a judgment of Wright J., reported [1897] 2 Q. B. 239.

The plaintiff was the owner of certain fields near Bridgend, in the county of Glamorgan, and adjoining an occupation road, of one-half of which he was also owner. The defendants were, by a special Act incorporating the Railways Clauses Act, 1845, authorized to make a railway across the road, at a point at which it adjoined the plaintiff's land. This they proceeded to do, but they did not, before commencing operations, "cause a sufficient road to be made instead of the road to be interfered with," as required by s. 53 of the Railways Clauses Act, 1845. The plaintiff brought this action to recover a penalty under s. 54 of the same Act. (1) The sum for which the verdict

(1) The Railways Clauses Act, 1845, s. 54: "If the company do not cause another sufficient road to be so made before they interfere with any such existing road as aforesaid, they shall forfeit 20*l.* for every day during which such substituted road shall not be made after the existing road shall have been interrupted; and such penalty shall be paid to the trustees, commissioners, surveyor, or other person having the management of such road, if a public road, and shall be applied for the purposes thereof, or in case of a private road the same shall be paid to the owner thereof, and every such penalty shall be recoverable with costs by action in any of the superior courts."

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should be entered, if the plaintiff was entitled to recover, was agreed upon.

The learned judge gave judgment for the plaintiff. (1)

The defendants appealed.

1898. Jan. 18. *Cripps, Q.C.*, and *Kenyon Parker*, for the defendants. Only one penalty is recoverable, and that is to be paid to the owner of the road interfered with. By the interpretation clause the singular is to import the plural, so that the owners of the road may sue. It follows that all the owners must join to recover the penalty. There is no provision for apportionment, and no one who merely owns part of the road can sue without the other owners. Such an owner would have a remedy under s. 55 for the loss he actually sustains. Even if it is unnecessary that all the owners of the road should join in suing, the owners of the soil of each half of it at this place must do so.

The alternative, that every owner of any part of the road may sue independently for the penalty would involve a hardship on the company which cannot have been intended.

*C. A. Russell, Q.C.*, and *E. Buckley*, for the plaintiff. The statute enables any person whose right is interfered with to recover penalties. Supposing a parish boundary ran along the middle of the road, each of the authorities could sue. To insist on the joinder of all the owners of different parts of the road would in most cases defeat the object of the statute, which was to impose penalties for breach of the provisions of s. 53, since the difficulty of getting all the owners to combine would generally be insuperable.

*Cripps, Q.C.*, in reply.

*Cur. adv. vult.*

Feb. 3. The judgment of the Court (A. L. Smith, Chitty, and Collins L.JJ.) was read by

CHITTY L.J. This is an action to recover penalties from the defendants, a railway company, who, in contravention of the 53rd section of the Railways Clauses Act, 1845, cut

(1) [1897] 2 Q. B. 239.

through and otherwise interfered with a private road without first causing a sufficient road to be made in substitution, as required by that section.

The plaintiff is the owner of the soil of half the road up to the middle line in that part of the road which was wrongfully cut through and interfered with. Wright J. gave judgment for the plaintiff for the amount at which the parties agreed the penalties in the event of the plaintiff being entitled to succeed. The only point raised by the defendants on the appeal was that the plaintiff was not "the owner" of the private road within the meaning of the 54th section of the Act. The contention was pushed to the extreme length of saying that "the owner" meant all the owners for the entire length and breadth of the road, and, apparently, without any defined limit in the direction of the road; and it was argued that no action could be sustained for the penalties unless all such owners joined in the action. This contention is extravagant; if accepted, it would operate to defeat the obvious intention of the Legislature in many, if not in most, cases. If any one of a dozen or a hundred of such owners declined to join in suing, the railway company would escape the penalty. It was further contended for the defendants that if this argument failed (as we think it does) the owner of the soil in the other half of the road ought to have joined in this action, and that the plaintiff suing alone cannot recover. At the outset it is plain that the owner of one-half had not in 1845, nor has he now, any power to compel the owner of the other half to join in suing.

The question turns on the 53rd, 54th, and 55th sections of the Act. It is not necessary to state in full the terms of the 53rd section. There is nothing in that section, or in the other parts of the Act, to oust the jurisdiction of the Court to grant an injunction. The 54th section divides itself into two parts. The first imposes the penalty, and runs thus: "If the company do not cause another sufficient road to be so made before they interfere with any such existing road as aforesaid, they shall forfeit 20*l.* for every day during which such substituted road shall not be made after the existing road shall have been interrupted." This is plainly a penalty; it is not intended to be a

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sum payable by way of compensation for the wrong done to any particular person, or to his soil or interest in the road. It is imposed by way of punishment on the railway company for their high-handed and illegal acts in violation of the provisions of the 53rd section, and it is intended as a deterrent against the continuance of the illegal acts. There is another point. The penalty is 20*l.* for every day during which the offence is committed. We think it is clear on the language of the statute itself, and without having recourse to the principle on which the leading case of *Crepps* v. *Durden* (1) was decided, that one penalty and one penalty only is inflicted for every day. Wright J. seems to have been inclined to think that more than one penalty of 20*l.* for each day was recoverable. We are unable to accept that suggestion. But we entirely agree with him in the opinion that the penalty is not apportionable: it is one entire sum of 20*l.* This has an important bearing on the second part of the section, and tends to support the plaintiff's case. The second part runs thus: "And such penalty shall be paid to the trustees, commissioners, surveyor, or other person having the management of such road if a public road, and shall be applied for the purposes thereof, or in case of a private road the same shall be paid to the owner thereof, and every such penalty shall be recoverable with costs by action in any of the superior courts."

Before commenting on this part of the 54th section we will state shortly the effect of the 55th section: "If any party entitled to a right of way over any road so interfered with" suffers special damage by reason of the failure to substitute a sufficient road, he may recover the special damage by action "whether any party shall have sued for such penalty as aforesaid or not, and without prejudice to the right of any party to sue for the same." Damages recoverable under this section are by way of compensation to the person whose right of way is interfered with, and who can prove special damage. These damages are wholly distinct from the penalty, and are recoverable whether the penalty has been sued for or not. There may be a question whether the right of way spoken of in this section

(1) (1777) Cowp. 640.

is a right of way in the strict legal sense of the term, or a right of passing over the road in the more popular meaning of the words. It is not necessary to express any opinion on this point, and we refrain from so doing. If the term is used in the strict sense, the owner of the soil of one-half of the road could not recover the special damage in respect of his own half of the soil of the road, because a man has no right of way over his own land; but he could in a case like the present recover his special damage for obstruction of the right of way which he is entitled to over the other half of the soil of the road, and the owner of that half would be in a corresponding position. If, on the other hand, the expression "right of way" is used in the popular sense, then each owner could recover the special damage proved in respect of the entire breadth of the road. Practically there would be little if any difference between the amount of the special damage recoverable whichever view be taken of the meaning of the term "right of way." These considerations appear to us to remove in great measure the difficulty which Wright J. felt in the supposed case of the railway company breaking up or stopping up a mile of road, each hundred yards of which is owned by a different person. The 55th section applies to a public road and a private road without distinction, and all persons, whether landowners or not, who are entitled to a right of way, or of passing over the road (whichever be the right expression), can recover the amount of the special damage sustained, whether the road be public or private, and quite irrespectively of the penalty.

We revert to the second part of the 54th section. Under the older system of legislation, the enforcement of the penalty would probably have been left to the common informer in a qui tam action; and had such been the case the informer who first instituted proceedings, or obtained judgment, would have received the fruits of his diligence to the exclusion of all others. But here the common informer is excluded by the language used. The enactment is that the penalty shall be paid. Then a distinction is drawn between a public road and a private road. In the case of a public road the penalty is to be paid to the

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trustees, commissioners, surveyor, or other person having the management of the said road.

Exactly the same point as is raised on this appeal might arise with respect to a public road. The management of the road, conceivably, might be vested in one body up to the middle of the road on one side, and in a different body up to the middle on the other side. It was stated at the bar that such cases do in fact exist. In the case of a private road the enactment is that the penalty shall be paid "to the owner thereof," and the section concludes by making the penalties recoverable in both cases by action. Now, we think that the word "thereof" relates exclusively to that particular portion of the road which is crossed, cut through, or otherwise unlawfully interfered with by the company in violation of the 53rd section. The defendants' counsel referred to the interpretation clause (s. 3) as to words importing the singular number including the plural, which is in the usual form, and argued that "the owner" meant all the owners of the parts affected. They did not refer to the same clause as to the interpretation of the term "owner," because they admitted (and rightly) that the plaintiff was owner of the soil of half the road within the Act. When an Act is open to two constructions, that construction ought to be adopted which is the more reasonable, and the better calculated to give effect to the expressed intention, which, in this case, is that the penalty shall be paid. The result of adopting the defendants' contention would be in many cases to enable the company to escape the penalty by placing practical difficulties in the way of its recovery. As already pointed out, the owner of one-half of the soil of the road cannot compel the owner or owners of the other half to join in suing: he or they may decline to do so without assigning any reason; they may be numerous, or under some incapacity, as infancy, lunacy, or the like, or they may be interested in the company. The conclusion at which we arrive is that the Act ought so to be read so as to afford facilities for suing; that the owner of the soil of part of the portion of the road interfered with can sustain an action for the penalty; and that in analogy to the case of the common informer, the first of such owners who sues and

brings his action to trial can recover. We further hold that the plaintiff can retain the penalty for his own use, and that the defendants are not liable to more than one penalty of 20*l.* for each day during which their wrongful acts are continued.

For these reasons we think the appeal ought to be dismissed.

*Appeal dismissed.*

Solicitors for plaintiff: *Soames, Edwards & Jones.*
Solicitors for defendants: *Downing, Bolam & Co.*

A. M.

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## LORD MONKSWELL AND OTHERS, PETITIONERS; THOMPSON, RESPONDENT.

1898 *Feb.* 12.

*Election Petition—School Board—Recount of Votes—Correctness of Returning Officer's Figures—Onus of Proof.*

At an election for a school board there were eight candidates for five seats. The five highest on the poll, of whom the respondent was fifth, were declared by the returning officer to be elected. A petition was presented by the candidate who was sixth on the poll against the election of the respondent, on the ground that certain votes given for the petitioner had been wrongly counted for the respondent or for some other candidate, and the petitioner claimed the seat. A recount having been had of the votes given for the respondent and the petitioner, it appeared that the petitioner had a majority over the respondent. The votes of the other candidates were not recounted:—

*Held*, that the petitioner was entitled to the seat, for that it was enough for him to establish that he had more votes than the respondent, and that it was unnecessary for him to recount the votes given for the first four candidates.

CASE stated under s. 93, sub-s. 7, of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), in the matter of a school board election petition.

An election for the office of members of the School Board of London for the Chelsea Division was held on November 25, 1897, when there were eight candidates for five seats. The

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names of the candidates and the number of the votes polled for each of them respectively were as follows:—

| | |
|---|---|
| Frederick Davies | 14,973 |
| Thomas Huggett | 14,906 |
| Mrs. Maitland | 14,839 |
| Viscount Morpeth | 13,292 |
| William Whitaker Thompson | 13,221 |
| Leslie Morton Johnson | 13,218 |
| Robert Petherbridge | 8,882 |
| Frederick George Jones | 5,937 |

The first five of the said candidates were declared by the returning officer to be duly elected.

A petition was duly presented on December 15 by Lord Monkswell and three other persons against the return of the said William Whitaker Thompson (the respondent), alleging that mistakes had been made in the counting of the ballot-papers, and that certain votes given in favour of the said Leslie Morton Johnson were erroneously rejected or counted for the respondent or some other candidate by the returning officer, and that by reason of such mistakes the result of the poll had not been truly ascertained, and that the said Leslie Morton Johnson had a majority of valid and lawful votes at the said election. And the petition prayed that a recount might be had of the votes recorded at the election in favour of the respondent and the said L. M. Johnson, and that it might be declared that the respondent was not duly elected, and that his election was void, and that the said L. M. Johnson (for whom the seat was claimed by the petitioners) was duly elected and ought to have been returned.

On December 21, 1897, Kennedy J. ordered that the case raised by the petition be stated as a special case, and that the ballot-papers relating to the election be examined, and the votes recorded thereon in favour of the said L. M. Johnson and of the respondent respectively should be recounted, and the result of such recount be stated in the special case.

The respondent appealed to the Court of Appeal to reverse the said order or to vary it by directing that the votes recorded

in favour of all the candidates at the election, or so many of them as to the Court should seem just, be recounted. The Court dismissed the appeal.

The examination and recount took place with the result that the number of votes recounted for the said L. M. Johnson and for the respondent respectively were as follows:—

| | |
|---|---|
| Leslie Morton Johnson . . . . . | 13,183 |
| The respondent . . . . . | 13,176 |

In addition to the ballot-papers containing the above-mentioned votes there were twenty-three ballot-papers remaining in dispute at the end of the recount, which were annexed to and formed part of the special case.

The questions for the Court were:—

1. Whether the election of the respondent was void?

2. Whether the said L. M. Johnson was duly elected and ought to have been returned?

3. Whether it was in any case open to the petitioners to upset the election of the respondent and claim the seat for the said L. M. Johnson without shewing that, on a true calculation of the votes recorded, the respondent was not one of the five candidates standing highest on the poll, and that the said L. M. Johnson was one of such candidates?

The Divisional Court (Hawkins and Channell JJ.), on an examination of the above-mentioned disputed ballot-papers, held that the said L. M. Johnson had a majority of five votes over the respondent.

*Yarborough Anderson*, for the respondent. The ground on which the petitioners rely for avoiding the election of the respondent is that he "was not duly elected by a majority of lawful votes." (1) In order to establish that, inasmuch as

(1) By s. 36 of the Municipal Elections Act, 1884 (47 & 48 Vict. c. 70), the provisions of Part IV. of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), shall apply to elections for the office (amongst others) of a member of a school board. By s. 87, sub-s. 1, of the Municipal Corporations Act, 1882, "a municipal election may be questioned by an election petition on the ground—

"(*d*) That he (the person whose election is questioned) was not duly elected by a majority of lawful votes."

Sect. 88, sub-s. 4: The petition

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there were five seats, it is not enough for them to shew that Johnson had more votes than the respondent; they must go further, and shew that the respondent was not one of the first five candidates. The petitioners contend that they do shew that, for they say that, as the returns of the first four candidates have not been questioned on petition, the numbers of their votes as returned must be taken to be conclusive, and that the figures of the respondent as now determined are less than those of any of the first four as returned. But that contention involves an arithmetical absurdity. For the petition alleges that votes which were given for Johnson were erroneously counted for the respondent "or some other candidate," and consequently the result now arrived at may, as the petition itself suggests, have been reached by adding to Johnson's total votes which had been wrongly counted for one of the first four. Therefore the petitioners have to contend that votes may be subtracted from the totals of the first four for the purpose of being added to Johnson's total, and that, notwithstanding such subtraction, the totals of the first four are to remain the same. The respondent is prepared to accept either the returning officer's figures for the whole of the candidates, or the true figures for the whole. But it ought to be one or the other. It is not suggested that if, on a recount of the votes of the first four, one of them were shewn to have fewer votes than the respondent that candidate could be unseated, for his election has not been questioned; but the fact of his having fewer votes than the respondent would be very material for the purpose of shewing that the petition has been presented against the wrong person. The petition must be presented against the candidate whom the petitioners are prepared to shew on the true result stands lowest on the poll. The Court of Appeal did not decide this question against the respondent: they refused to deal with it, because they said it would be open to the respondent to raise

"shall be presented within twenty-one days after the day on which the election was held."

Sect. 89, sub-s. 3: "Within five days after the presentation of the petition the petitioner shall in the prescribed manner serve on the respondent a notice of the presentation of the petition."

it on the argument on the special case. There is nothing in any statute which says that the returned totals of the candidates who are not petitioned against shall be treated as conclusive for the purpose now under consideration.

[CHANNELL J. Ought not the party whose election is questioned to file a cross-petition against the other successful candidates if he thinks that a recount of their votes will make any difference to him?]

It may be impossible for him to do so. By s. 88, sub-s. 4, of the Municipal Corporations Act, 1882, an election petition must be presented within twenty-one days after the date of the election, and by s. 89, sub-s. 3, notice of the petition is to be served on the respondent at any time within five days after the presentation of the petition. If, then, the respondent has no notice of the petition till after the twenty-one days have expired, it will be too late for him to present a cross-petition. And it would be manifestly absurd to require him to provide against that contingency by petitioning during the twenty-one days against the other successful candidates whose election at that time he has no desire to question. Without a recount in the form originally suggested by the respondent the petitioners do not provide the Court with materials on which a judgment can be pronounced.

*S. H. Day* and *Willoughby Williams*, for the petitioners, were not called upon.

HAWKINS J. I am of opinion that the respondent's contention must fail. By s. 2 of the Ballot Act, 1872 (1), the mode in which the poll at elections shall be taken and declared is very fully set forth, and the section provides (inter alia) that after the close of the poll the returning officer shall "ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given. . . . . The decision of the returning officer as to any question

(1) By Sched. II., r. 1, of the Education Act, 1873 (36 & 37 Vict. c. 86), the provisions of the Ballot Act, 1872, as to the conduct of municipal elections are to apply to school board elections.

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arising in respect of any ballot-paper shall be final, subject to reversal on petition questioning the election or return." Here the returning officer returned the names of the elected candidates with the number of votes given to each, namely, Davies, 14,973; Huggett, 14,906; Mrs. Maitland, 14,839; Viscount Morpeth, 13,292; and Thompson (the respondent), 13,221. As regards the first four of those elected candidates, no objection was taken to their election within the twenty-one days allowed by law for that purpose, nor was it ever suggested within that period that there had been any error in the counting of their votes. As far, therefore, as they are concerned, I think that the decision of the returning officer that they had each polled so many votes must be taken as final. Then against the election of the respondent, who was fifth on the poll, a petition was presented on behalf of Mr. Johnson, who was sixth; and that petition, after alleging that mistakes had been made by the returning officer in counting the votes, prayed that a recount might be had of the votes recorded in favour of the respondent and Johnson respectively, and that it might be determined that the respondent was not duly elected. And the result of the recount is to shew that Mr. Johnson had, in fact, more votes than the respondent. But then it is said that that is not enough to establish the petitioners' case that the respondent was not duly elected, for that it is consistent with his having less votes than Mr. Johnson that he might have been shewn to have more votes than one or other of the first four candidates if the votes of all the candidates had been recounted. The answer to that contention is that the onus of proving that any of the first four had in fact fewer votes than were returned lies on the party who asserts it. Unless the respondent can shew that the votes of any of the first four candidates have been wrongly counted, we must take the figures returned against their names by the returning officer as correct. If there were any real suggestion that an error had been committed in the counting of their votes, we might perhaps have some difficulty in saying what course ought to be pursued. But it is not pretended that any particular mischief has been done to the respondent by the counting; all that is suggested is that if the

votes of all the candidates were recounted there is a bare possibility that a certain number of votes might be added to the present poll of the respondent. I am of opinion that we must give judgment for the petitioners, that the respondent be declared not duly elected, and that Mr. Johnson be declared elected.

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CHANNELL J. I am of the same opinion. If we are to accept as the correct numbers of the votes given for the first four candidates the numbers returned upon the declaration of the poll, it is quite clear what our judgment ought to be. The only question is whether we are bound to treat them as correct. I think we are. The section of the Ballot Act to which Hawkins J. has referred provides that the decision of the returning officer as to any one ballot-paper shall be final. It seems to follow that his decision must be final as to any larger number. But, even if that provision as to the finality of his decision does not apply to the computation of the numbers, still, as it is his duty to count the votes, his computation must, in the absence of any evidence of error in the counting, be presumed to be correct upon the principle that "Omnia praesumuntur rite esse acta." An election petition is subject to the ordinary rule that the burden of proving an allegation is upon the person who makes it. Then if you start with the returning officer's figures, who is it who says they are wrong? The petitioners do not. They say that the figures of the first four are right, and that it is only those of the fifth and sixth that are wrong. It is the respondent who suggests that the figures of the first four may be wrong. But he has given no evidence in support of that suggestion. If, indeed, he had shewn that those figures were wrong—subject to the question as to the way in which he must have shewn it, whether in this petition or in another petition—and that any one of those four had a less number of votes than he has now been ascertained to have, then I think that he could not be unseated. It may be that if the respondent had taken out a summons on his own account in this petition for a recount of the votes of the first four candidates in order to shew that too many votes were counted

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for one or other of them, he ought not to be allowed to have such recount; for it may be that the proper course is to raise the question by petition in the proper time. It is quite true that a person who has been declared by the returning officer to be duly elected is not likely to petition against one of the other elected candidates before he has been petitioned against himself. And if the petition against himself is deferred till the last of the twenty-one days, it may be too late for him to present a cross-petition. But that would be his misfortune. It is sufficient for our judgment to say that it has not been shewn that there was any error in the poll of the first four candidates, and that in the absence of such proof the presumption is that their figures are right. We must give our judgment as to the result of this election on the basis that the figures of the first four candidates were correctly declared, and the order of the figures of the fifth and sixth has been reversed. Therefore the respondent must be declared to have been not duly elected, and Mr. Johnson, on whose behalf the petition is presented, must be declared elected in his place.

*Judgment for the petitioners.*

Solicitors for petitioners: *Radford & Frankland.*
Solicitors for respondent: *Lewin & Co.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1898
*Feb.* 1.

## MONTGOMERY, JONES & CO. *v.* LIEBENTHAL & CO.

*Practice—Service of Writ—Defendant Domiciled or Ordinarily Resident in Scotland—Agreement that Writ may be Served upon Agent in England—Order* IX., *rr.* 1, 2.

An agreement by a person domiciled or ordinarily resident in Scotland, that a writ for breach of contract may be served by leaving it with an agent in England, appointed by him to accept service, is valid, and service upon the agent is good service on the defendant.

*Tharsis Sulphur Co.* v. *Société Industrielle des Métaux*, (1889) 58 L. J. (Q.B.) 435; 60 L. T. 924, approved.

APPEAL from the refusal of Phillimore J. at chambers to set aside the service of the writ of summons.

The defendants, who were corn merchants residing and carrying on business at Leith, in Scotland, agreed by a contract in writing to sell to the plaintiffs, who were corn merchants carrying on business at Liverpool, a cargo of wheat. The contract, which was made at Leith and was headed "London Corn Trade Association," contained the following clauses: "Buyer and seller agree that for the purpose of proceedings either legal or by arbitration this contract shall be deemed to have been made in England and to be performed there . . . . and the Courts of England or arbitrators appointed in England, as the case may be, shall, except for the purpose of enforcing any award made in pursuance of the arbitration clause hereof, have exclusive jurisdiction over all disputes which may arise under this contract. Such disputes shall be settled according to the law of England whatever the domicil, residence, or place of business of the parties to this contract may be or become . . . . Any party to this contract residing or carrying on business either in Scotland or Ireland shall for the purposes of such proceedings be considered as ordinarily resident or carrying on business at the office of the London Corn Trade Association, and being a party residing or carrying on business in Scotland shall be held to have prorogated jurisdiction as against himself

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to the English Courts . . . . The service of proceedings . . . . upon a party residing or carrying on business in Scotland or Ireland, by leaving the same at the office of the London Corn Trade Association, together with the posting of a copy of such proceedings to the address in Scotland or Ireland, shall be deemed good service, any rule of law or equity to the contrary notwithstanding." The contract also contained a stipulation that all disputes arising thereunder should be referred to two arbitrators, who should have power to appoint a third, the award of any two arbitrators to be conclusive and binding upon the parties, subject to the right of either party, if dissatisfied with the award, to appeal to the Committee of Appeal of the London Corn Trade Association, whose decision should be final.

Disputes arose between the parties as to the non-delivery of the wheat in accordance with the contract, and were referred to arbitration, and an award was made by the Committee of Appeal of the London Corn Trade Association in favour of the plaintiffs for 7353*l.* 3*s.* 6*d.* The plaintiffs issued a writ for service within the jurisdiction against the defendants to recover this amount, and served it by delivering a copy thereof to the secretary of the London Corn Trade Association at the office of the association in London, and they also sent a copy of the writ by post to the defendants at their address in Leith in accordance with the contract. The defendants applied to the judge at chambers to set aside the service of the writ, which was refused.

The defendants appealed.

*McCall, Q.C.*, and *H. Tindal Atkinson*, for the defendants. The service in this case was bad. There are only three modes of service according to the rules: personal service under Order IX., r. 2, substituted service under Order LXVII., r. 6, and service out of the jurisdiction under Order XI. The only exception is that allowed by Order IX., r. 1, if the defendant by his solicitor undertakes in writing to accept service and enters an appearance. Service must be effected according to the rules, and no service is valid unless it is so effected. It is not competent to

the parties to contract that a different mode of service shall be adopted: *British Wagon Co.* v. *Gray.* (1) There the Court decided that an agreement, by a person resident in Scotland, that a writ for breach of contract arising within the jurisdiction might be served on him in Scotland, did not authorize the Court to direct service of the writ in Scotland, as to do so would be in contravention of Order XI., r. 1 (*e*). In that case Lord Esher M.R. said (2): "The Court can take no notice of such an agreement, and can only order service of the writ in the manner allowed by the rules, and not in any other manner upon which the parties may agree."

The decision in *Tharsis Sulphur Co.* v. *Société Industrielle des Métaux* (3) is inconsistent with the case of *British Wagon Co.* v. *Gray* (1), and the dicta of Field J., that a person may appoint another as agent to accept service, went too far. Even if that decision is good law, it does not cover this case, because here the plaintiffs are endeavouring to bring persons who are resident in Scotland within the jurisdiction of the English Courts, a proceeding which is prohibited by Order XI., r. 1 (*e*). This case also differs in another respect from the *Tharsis Sulphur Co.* v. *Société Industrielle des Métaux* (3), because in the present agreement no person is named as the person to accept service. The agreement would be complied with by placing a copy of the writ under the door of the office without handing it to anyone. That cannot be considered good service, and, therefore, the agreement upon that point is futile. Moreover, part of the service consists in sending a copy of the writ by post to the defendants in Scotland. That amounts to service on the defendants in Scotland, which is prohibited by Order XI., r. 1 (*e*): *Lenders* v. *Anderson.* (4)

[They also referred to *Société Industrielle des Métaux* v. *Companhia Portugueza dos Minas de Huelva.* (5)]

Secondly, the agreement does not cover the service of a writ. Service of "proceedings" does not include the service of a writ.

(1) [1896] 1 Q. B. 35.
(2) [1896] 1 Q. B. at p. 36.
(3) 58 L. J. (Q.B.) 435; 60 L. T. 924.
(4) (1883) 12 Q. B. D. 50.
(5) W. N. (1889) 32.

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*Joseph Walton, Q.C.*, and *L. Sanderson*, for the plaintiffs. There is nothing in the rules which prohibits a party from agreeing to appoint an agent to accept service for him. The plaintiffs are not applying to the Court for an order to effect service. The case of *British Wagon Co.* v. *Gray* (1) shews that the parties cannot by agreement give the Court a jurisdiction which is forbidden by the rules. Here no application to the Court is necessary, and that is the distinction between that case and the present one. In *Tharsis Sulphur Co.* v. *Société Industrielle des Métaux* (2) it was held that a person may appoint another to accept service for him, and that service on that person will be considered good service. The true meaning of the agreement in this case is that the writ may be served by leaving it with some one at the office of the London Corn Trade Association. There was, therefore, good personal service. Again, the sending of a copy of the writ by post to the defendants in Scotland is not part of the service of the writ. It is something to be done subsequent to the service, so as to inform the defendants that service has been effected. Order XI., r. 1 (*e*), therefore, has no application.

*H. Tindal Atkinson* replied.

A. L. SMITH L.J. In my opinion this appeal fails. The defendants applied at chambers to set aside the service of the writ of summons upon them. The answer of the plaintiffs to that application is that the defendants have agreed that the writ should be served in the way in which it has been served, and that such service should be equivalent to personal service on them. The facts are these. The plaintiffs are corn merchants carrying on business in Liverpool, and the defendants are corn merchants resident and carrying on business in Scotland. The defendants agreed to sell a cargo of wheat to the plaintiffs, and the contract contains a stipulation that all disputes arising out of the contract should be referred to two arbitrators, subject to an appeal to the Committee of Appeal of the London Corn Trade Association. The contract also contains a clause that any party to it residing or carrying on business either in Scot-

(1) [1896] 1 Q. B. 35. (2) 58 L. J. (Q.B.) 435; 60 L. T. 924.

land or Ireland shall for the purpose of such proceedings be considered as ordinarily resident or carrying on business at the office of the London Corn Trade Association, and the contract goes on to provide that "service of proceedings upon a party residing or carrying on business in Scotland or Ireland, by leaving the same at the office of the London Corn Trade Association, together with the posting of a copy of such proceedings to the address in Scotland or Ireland, shall be deemed good service," i.e. good personal service. In the first place, it seems to me to be clear that the expression "service of proceedings" includes the service of a writ. That being so, the service contemplated by the contract is service at the office of the London Corn Trade Association. That does not mean, as has been suggested, that the writ may be served by merely pushing it under the door of the office or doing anything of that sort. It means that the writ must be left with some person at the office, as was done in this case. The service was therefore effected at the office in accordance with the contract. After the service had been so effected, a letter containing a copy of the writ was, in accordance with the contract, posted to the defendants in Scotland to inform them that the writ had been served. The question arises whether that agreement as to service is or is not a valid agreement. The writ, as I have said, has been served in the manner in which the parties agreed that it should be served. The defendants, nevertheless, say that there has been no effective personal service upon them, because the agreement as to service is invalid. To my mind that point is not tenable. I can see nothing in the rules to prevent the parties from agreeing to such a course of proceedings, and I can find no case in the books which shews that such an agreement as that made in this case is invalid. The case of *Tharsis Sulphur Co.* v. *Société Industrielle des Métaux* (1) is an authority in support of the proposition that the parties can, as regards the mode of service, contract themselves out of the rules, and may appoint a person as agent to accept service, so long as they do not ask the Court to do something which it is prohibited from doing under the rules. In the present case

(1) 58 L. J. (Q.B.) 435; 60 L. T. 924.

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no application was made to the Court for leave to serve the writ in the manner agreed upon, nor was any application necessary. The case of *British Wagon Co.* v. *Gray* (1) was relied upon by the defendants. That decision went upon Order XI., r. 1 (*e*), which deals with service out of the jurisdiction. That rule allows service of a writ out of the jurisdiction where the action is founded on any breach within the jurisdiction of any contract wherever made, which according to the terms thereof ought to be performed within the jurisdiction; but the last clause expressly prohibits the rule from being applicable in the case of a defendant who is domiciled or ordinarily resident in Scotland or Ireland. The plaintiffs in *British Wagon Co.* v. *Gray* (1) applied, and had to apply, for leave to serve the writ on the defendant, who was resident in Scotland, on the ground that he had agreed to be served in Scotland; but Mathew J. at chambers refused leave on the ground that the rule expressly forbade such an order being made by the Court, and that the existence of the agreement could make no difference; and this Court affirmed his decision upon that ground. The pith of that case is well summed up by Lopes L.J., where he says that "assuming the contract had the effect which it is contended that it had, I think it is clear that the parties had no power to contract that the Court should have a jurisdiction which is forbidden by the rules." Lord Esher M.R. said that "the Court can take no notice of such an agreement, and can only order service of the writ in the manner allowed by the rules, and not in any other manner upon which the parties may agree." With that I entirely agree; but that is not this case. There is no application to the Court in this case to do something which it is forbidden by the rules to do. This case comes within the decision in *Tharsis Sulphur Co.* v. *Société Industrielle des Métaux* (2), which I think is a right decision. The appeal must, therefore, be dismissed.

CHITTY L.J. I am of the same opinion. It is clear to me that this agreement as to service of "proceedings" extended to

(1) [1896] 1 Q. B. 35. (2) 58 L. J. (Q.B.) 435; 60 L. T. 924.

the service of a writ of summons. That point, therefore, fails. I also think that this writ was properly served in accordance with the agreement. I cannot agree with the contention of the defendants that the effect of the agreement is that the writ might be served by merely leaving it at the office without handing it to any one there. The provision in the agreement as to leaving it at the office means that the writ must be left with an adult person at the office. It seems to me to be equivalent to an appointment of an agent to accept service. The writ was, therefore, properly served in accordance with the agreement by being left with the secretary at the office.

There remains the question, which is the main question in the case, whether the agreement as to the service is a valid agreement or not. The argument is that the service was not effected according to the rules, and is therefore void. In my opinion the distinction pointed out between this case and the case of the *British Wagon Co.* v. *Gray* (1) is a sound one. In that case the Court was dealing with Order XI., which, as has been said, contains a complete code governing service out of the jurisdiction. The Court can only allow service out of the jurisdiction in the cases there specified, and rule 1 (*e*) of that order shews at once that the Court has no jurisdiction, in the case of a contract to be performed within the jurisdiction, to allow service out of the jurisdiction on a person who is domiciled or ordinarily resident in Scotland or Ireland. So that the Court there had to deal with an express prohibition as to service out of the jurisdiction. There is no such provision applicable to this case. I do not propose to travel through the rules. I can find no rule which prohibits a person from agreeing as to the mode in which service may be effected on him, as, for instance, by the writ being left with his wife or with some other person. If the contention of the defendants is correct, a person who is ill cannot make a request that the plaintiff should hand the writ to his wife, but must endure the inconvenience of being served personally, otherwise the service will be bad as being in contravention of the rules. I cannot find that in any of the rules. This case comes within the

(1) [1896] 1 Q. B. 35.

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principle of the decision of the Divisional Court in *Tharsis Sulphur Co.* v. *Société Industrielle des Métaux* (1), and I see no reason for differing from the judgment of Field J. in that case. That learned judge thought it clear upon principle that a person might appoint another as agent to accept service for him, and might enter into a contract that the agent should be the person to accept service, and that service upon that agent should be good service upon himself. That seems to me to be good sense. This case falls within the principle there laid down, and I can find no rule which avoids any such agreement.

COLLINS L.J. I am of the same opinion. If it is once conceded that the parties have a right to contract themselves out of the rules and to substitute a special mode of service for that provided by the rules, the case is concluded. I feel no difficulty in principle in coming to that conclusion, and when I look at the cases I find that the *Tharsis Sulphur Co.* v. *Société Industrielle des Métaux* (1) is a clear authority in support of that conclusion. It is said that the decision in the *British Wagon Co.* v. *Gray* (2) is inconsistent with that view. I do not think it is. In that case the plaintiffs were obliged to come to the Court and ask it to do something which it was forbidden by the rules to do. That is not the case here. In the present case the parties have put into operation the machinery as to service which they themselves have provided, and now when that machinery has been put into operation the defendants ask the Court to treat that agreement as non-existent, and to set aside the service. I do not think we can do that. There is no prohibition, express or implied, in the rules against their coming to such an arrangement. In my opinion the defendants must fail in their contention, and the appeal must be dismissed.

*Appeal dismissed.*

Solicitors for plaintiffs: *Burton, Yeates & Hart, for Tyrer, Kenion, Tyrer & Simpson, Liverpool.*

Solicitors for defendants: *Murray, Hutchins, Stirling & Murray.*

(1) 58 L. J. (Q.B.) 435; 60 L. T. 924. (2) [1896] 1 Q. B. 35.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1898
*Feb.* 24.

## FURNESS *v.* BERESFORD.

### (THE YORK ELECTION PETITION.)

*Parliament—Election Petition—Particulars—Scrutiny—Claim of Seat—Election Petition Rules*, 1868, *rr.* 6, 7.

Rule 6 of the Election Petition Rules, 1868, does not apply in the case of a claim for the seat for an unsuccessful candidate on the ground that he had a majority of lawful votes. In such a case rule 7 is exclusively applicable, and therefore an order for particulars cannot be made.

*Munro* v. *Balfour*, [1893] 1 Q. B. 113, followed.

APPEAL from the order of a judge at chambers directing the petitioner in an election petition to give particulars as aftermentioned.

The petitioner and the respondent were candidates at a parliamentary election for the city of York, at which the respondent was declared to be duly elected. The petitioner by his petition claimed the seat, and asked for a scrutiny and recount of votes, but did not seek to have the election declared void. Paragraph 6 of the petition alleged that certain persons voted at the election who were guilty of corrupt and illegal practices, illegal payments, illegal employment, and illegal hiring at the said election, and that the votes of those persons were void and ought to be struck off the poll. On the application of the respondent the judge at chambers made an order that the petitioner should within four days from the date of the order deliver to the respondent particulars of the corrupt and illegal practices, illegal payments, illegal employment, and illegal hiring mentioned in the 6th paragraph of the petition. (1)

(1) By the Rules made under the Parliamentary Elections Act, 1868, it is provided as follows:—

"Rule 6. Evidence need not be stated in the petition, but the Court or a judge may order such particulars as may be necessary to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial in the same way as in ordinary proceedings in the Court of Common Pleas, and upon such terms as to costs and otherwise as may be ordered.

"Rule 7. When a petitioner claims the seat for an unsuccessful candidate, alleging that he had a majority of

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*Dickens, Q.C.*, and *Willoughby Williams*, for the petitioner. The learned judge had no jurisdiction to make the order which he made. Where, as in the present case, the petitioner does not seek to avoid the election, but only claims a scrutiny and recount, rule 7 of the rules made under the Parliamentary Elections Act, 1868, applies exclusively, and an order for particulars cannot be made under rule 6: *Munro* v. *Balfour*. (1) The *Guildford Petition* (2) is distinguishable on the grounds mentioned in *Munro* v. *Balfour*. (1) It is manifestly the intention of rule 7 that both parties shall be placed in the same position with regard to particulars, whereas, if such an order for particulars as was made here can be made in favour of the respondent under rule 6, he will be in a better position than the petitioner, because he can attack votes given for the petitioner without any further notice than must be given under rule 7.

*Jelf, Q.C.*, and *Lewis Coward*, for the respondent. The particulars which the respondent asks for, and which the judge's order was intended to give him, are not detailed particulars such as are provided for by rule 7, which are really scrutiny lists. The respondent does not ask for particulars of the persons whose votes are objected to, but merely for some particulars of the nature of the corrupt and illegal practices, and the illegal payments, employment, and hiring alleged, which may limit the extremely vague and general statements of the petition. It is clearly contemplated by rule 2 that the petition shall state the facts and grounds relied upon with somewhat greater particularity than this petition does: see the observa-

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lawful votes, the party complaining of or defending the election or return, shall, six days before the day appointed for trial, deliver to the master, and also at the address, if any, given by the petitioners and respondent, as the case may be, a list of the votes intended to be objected to, and of the heads of objection to each such vote, and the master shall allow inspection and office copies of such lists to all parties concerned; and no evidence shall be given against the validity of any vote, nor upon any head of objection not specified in the list, except by leave of the Court or judge, upon such terms as to amendment of the list, postponement of the inquiry, and payment of costs, as may be ordered."

(1) [1893] 1 Q. B. 113.

(2) (1868) 19 L. T. 528.

tions of Bruce J. in the *Lancaster Division Case*. (1) A distinction was made between the two kinds of particulars, namely, particulars of the nature of the malpractices complained of and particulars of the individual cases in which they were alleged to have been committed, in the *Salford Petition* (2) and the *Beverley Case* (3), where orders were made by which particulars of the former kind were ordered to be given within four days from the making of the order, and particulars of the latter kind three days before the trial. The number of different kinds of practices which are illegal at an election is very great, and the respondent is entitled to have some information as to the nature of the particular malpractices charged to enable him to make inquiries at an earlier date than six days before the trial. It is said that he will be thereby placed in a better position than the petitioner. But, the respondent having been declared to be duly elected, there is a presumption in his favour, and it is therefore not unreasonable that the petitioner, who is attacking the return, and upon whom the onus of upsetting it lies, should be subjected to somewhat more stringent conditions than the petitioner. The decision in *Munro* v. *Balfour* (4) was no doubt correct, but that case is distinguishable from the present. There the respondent asked for detailed particulars such as the names of the persons alleged to have been bribed, treated, or unduly influenced, and the dates and places at which the offences were alleged to have been committed. Particulars such as these clearly came within rule 7, and therefore there was no jurisdiction to order them to be given under rule 6.

*Dickens, Q.C.*, in reply.

A. L. SMITH L.J. The petitioner in this case does not seek to avoid the election, on the ground of corrupt or illegal practices by the respondent or his agent, but only claims the seat and asks for a scrutiny and recount of the votes. In his petition he sets forth grounds upon which he alleges that votes

(1) (1896) 5 O'Malley & Hardcastle, 39, at p. 42.
(2) (1868) 19 L. T. 500.
(3) (1869) 1 O'Malley & Hardcastle, 143.
(4) [1893] 1 Q. B. 113.

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given for the respondent were void, and therefore he had not a majority of lawful votes in his favour. It appears to me that this petition is good in point of form. The counsel for the respondent complains of the generality of the allegations contained in paragraph 6 of the petition, but I do not think that those allegations are too general according to the practice which has prevailed in such cases. It has been the common form of petition in cases where it was sought to avoid an election to allege generally that it was void by reason of bribery, treating, and undue influence on the part of the member or, more commonly, of his agents. In such cases rule 6 applies. In those cases the great struggle always was, on the part of the respondent, to get particulars as long before the trial as he could, and on the part of the petitioner to avoid giving them till as late as possible. The election judges in the first instance used to order that they should be given three days before the trial, the idea being that, if they were given too soon, the witnesses for the petitioner might be tampered with and got out of the way. The respondent's counsel called our attention to two cases decided respectively in 1868 and 1869, namely, the *Salford Petition* (1) and the *Beverley Case* (2), in which orders were made that particulars of the nature of the corrupt and illegal practices charged in the petition should be given within four days of the making of the order, and particulars of the persons alleged to have been bribed, treated, intimidated, and conveyed to the poll should be given three days before the trial. I can only say that, so far as my experience goes, this was not the common form of order in later times, though it became the practice in such cases to order particulars of the bribery and other illegal acts alleged to be delivered at an earlier period than three days before the trial. In the present case, as I have already pointed out, the petitioner does not seek to have the election declared void, but only asks for a scrutiny and a recount. Rule 7 deals with a case of that kind. That rule expressly provides that in such a case the party complaining of or defending the election or return shall six days before the trial deliver to the master and at the address, if any,

(1) 19 L. T. 500. (2) 1 O'Malley & Hardcastle, 143.

given by the petitioners and respondent, as the case may be, a list of the votes intended to be objected to and of the heads of objection to each such vote. Under this rule the respective parties are placed upon an equality. Each has to give a list of objections upon the same day. In my opinion that rule has exclusive application to the case of a petition which like that in question only asks for a scrutiny, and rule 6 does not apply to such a case. I am fortified in that conclusion by the case of *Munro* v. *Balfour*. (1) In that case the petitioner was seeking to avoid the election on the ground of malpractices on the part of the respondent's agents and also claimed a scrutiny. The very same point as arises in this case was there decided. As regards that part of the petition which claimed to avoid the election an order was made for particulars under rule 6. But, with regard to that part of the petition which asked for a scrutiny, the Court said that rule 7 applied exclusively of rule 6, and therefore the judge had no jurisdiction to order delivery of particulars of the objections to votes under that part of the petition. That decision covers this case, and in my opinion it was correct. For these reasons I think the order of the learned judge was wrong and must be set aside.

CHITTY L.J. I am of the same opinion. The petitioner asks for a recount of votes and a scrutiny. The case is therefore within rule 7. The judge, acting under rule 6, has ordered the petitioner to give particulars of the corrupt and illegal practices, illegal payments, illegal employment, and illegal hiring alleged in paragraph 6 of the petition. I think that, in order to support his decision, we should have to say that *Munro* v. *Balfour* (1) was wrongly decided. I do not think that is so. I think that, where the petitioner merely alleges that the unsuccessful candidate had a majority of lawful votes, rule 7 applies exclusively, and it is not intended that there should be any other particulars than those specified in the rule itself, which works automatically without the necessity for any order. Rule 7 provides for the delivery of minute particulars, namely, a list of the votes intended to be objected to, and of

(1) [1893] 1 Q. B. 113.

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the heads of objection to each such vote. The counsel for the respondent endeavoured to distinguish the case of *Munro* v. *Balfour* (1) on the ground that in the present case the respondent was asking, not for particulars such as are contemplated by rule 7, but only for particulars of the nature and character of the illegal practices alleged in paragraph 6 of the petition —that is to say, for something intermediate between the general statements of the petition and those detailed particulars which must be delivered under rule 7. That is a very ingenious way of putting the case, but I do not think the decision in *Munro* v. *Balfour* (1) can be thus distinguished. In the case of a petition of this kind the respondent can attack votes given for the petitioner, and it is important to observe that rule 7 puts them both on an exactly equal footing with regard to particulars. The respondent is not bound to give the petitioner any notice that he will object to votes given for the petitioner, or of the grounds of his objection, until the time comes for exchanging the particulars specified in rule 7. If such an order as was made in the present case could be upheld, the result would be to put the respondent in a somewhat better position than the petitioner. I say in a "somewhat better" position, because, after listening to the argument of the respondent's counsel, I do not think the respondent would gain much by such an order for particulars as he is seeking to obtain. By having a statement of the nature and character of all possible kinds of illegal practices, he would get no practical information which would enable him to narrow the scope of his inquiries before the time came for the exchange of particulars under rule 7.

COLLINS L.J. I am of the same opinion. It appears to me that the decision in *Munro* v. *Balfour* (1) really concludes this case. The counsel for the respondent did not attempt to impugn that decision, and therefore we are justified in regarding it as a binding authority. It was suggested that it was distinguishable; but in my opinion it exactly covers the present case. The counsel for the respondent in that case argued that,

(1) [1893] 1 Q. B. 113.

although rule 7 provided for the delivery of certain particulars in a case where a scrutiny was claimed, it was not exclusive of rule 6, and that particulars might be ordered under the latter rule in such a case. But it was pointed out by the Court that the particulars were asked for in relation to that part of the petition which came within rule 7, and the very ground of the decision was that in such a case no order for particulars could be made under rule 6.

*Appeal allowed.*

Solicitors for petitioner: *H. P. & J. H. Cobb.*
Solicitors for respondent: *Sharpe, Parker & Co.*

E. L.

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## MANDER *v.* RIDGWAY.

1898 *Feb.* 15.

*County Court—Appeal—Stamp Objection—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 164—*Rules of the Supreme Court*, 1883, *Order* XXXIX., *r.* 8.

An appeal to the High Court does not lie from the ruling of a county court judge that a document tendered in evidence at the trial of an action before him is sufficiently stamped and admissible.

APPEAL by the defendant from the county court at Buckingham.

The action was brought on an alleged agreement in writing. At the trial an objection was taken on behalf of the defendant to the admissibility in evidence of the document in question, on the ground that it was insufficiently stamped. The county court judge ruled that the stamp was sufficient, and received the document in evidence, and gave judgment for the plaintiff.

*William Graham*, for the defendant, in support of the appeal. The document was insufficiently stamped, and ought not to have been admitted, and without it there was no evidence to support the plaintiff's case, but the first question is whether an appeal lies. Order XXXIX., r. 8 (1), of the Rules of the Supreme

(1) Order XXXIX., r. 8: "A new trial shall not be granted by reason of the ruling of any judge that the stamp upon any document is sufficient,

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Court, 1883, does not apply, for the case is not within the last clause of s. 164 of the County Courts Act, 1888 (1), being expressly provided for by Order XVIII., r. 9 (2), of the County Court Rules, 1889. This is not a general principle, but only a rule of evidence. Sect. 120 of the County Courts Act, 1888, gives a general right of appeal, subject to certain specified exceptions, not including the present case, which therefore comes within the general words: *Neptune Steam Navigation Co.* v. *Sclater; The Delano.* (3) This is a question as to the admission or rejection of evidence, and therefore expressly within s. 120.

*Macaskie*, for the plaintiff. No appeal lies. The case comes directly within Order XXXIX., r. 8. That provision has been held to have the effect of excluding all appeals based on stamp objections, and making the decision of the judge at the trial final: *Siordet* v. *Kuczinski* (4); *Blewitt* v. *Tritton.* (5)

MATHEW J. There is nothing in the point taken on behalf of the defendant. The case is provided for by the last sentence of s. 164 of the County Courts Act, 1888, by which, "In any case not expressly by this Act, or in pursuance thereof, provided for, the general principles of practice in the High Court of Justice may be adopted and applied to actions and matters." The provision applicable to the present case was formerly contained in s. 31 of the Common Law Procedure Act, 1854, and is now to be found in the Rules of the Supreme Court,

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or that the document does not require a stamp." This rule is in the same terms as s. 31 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125).

(1) 51 & 52 Vict. c. 43, s. 164, gives power to make rules for regulating practice, and concludes as follows: "In any case not expressly by this Act, or in pursuance thereof, provided for, the general principles of practice in the High Court of Justice may be adopted and applied to actions and matters."

(2) Order XVIII., r. 9: "Where an instrument which may be legally stamped after its execution is produced in evidence, and the same shall be unstamped or insufficiently stamped, it shall not be received in evidence until the party desirous of giving the instrument in evidence shall produce to the Court the receipt of the registrar for the amount of the unpaid duty, and of the penalty payable by law on stamping the same, and of the sum of 1*l.*"

(3) [1895] P. 40.

(4) (1855) 17 C. B. 251.

(5) [1892] 2 Q. B. 327.

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1883, Order XXXIX., r. 8. By the provision in question, "A new trial shall not be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp." By s. 164 of the County Courts Act, 1888, to which I have already referred, all doubt as to the applicability of this rule to the present case is removed, and the county court judge having decided at the trial that the document was sufficiently stamped, there is an end of the matter, and the appeal must be dismissed.

WRIGHT J. concurred.

*Appeal dismissed.*

Solicitors for plaintiff: *Field, Roscoe & Co., for W. L. Whitehorn, Banbury.*

Solicitors for defendant: *Digby & Liddle, for H. & E. H. Small, Buckingham.*

P. B. H.

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## THE QUEEN *v.* THE JUSTICES FOR THE WEST RIDING OF YORKSHIRE. *Ex parte* SHAW.

1897
*Nov.* 20;
*Dec.* 1.

1898
*Jan.* 22.

*Licensing Acts—Licence—Transfer—Premises pulled down—Person to apply—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 4, 14—*Practice—Mandamus—Costs.*

Where a licensed house is pulled down for the purpose of public improvements, and application is made under s. 14 of the Alehouse Act, 1828, for the grant to the person whose house has been pulled down of a licence in respect of other fit and convenient premises, the application must be made by a licensed person who was keeping the old premises as an inn at the time of their demolition.

Where a person, who has successfully opposed the granting of a licence, subsequently successfully shews cause against the making absolute of a rule nisi for a mandamus to the licensing justices or to quarter sessions, the Court has a discretion to grant him the costs of shewing cause against the rule, although licensing justices are not a court of summary jurisdiction.

*Boulter* v. *Kent Justices*, [1897] A. C. 556, considered.

RULE NISI for a mandamus to the justices of the West Riding of Yorkshire commanding them to shew cause why

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they should not enter or cause to be entered continuances to the next general quarter sessions upon the appeal of one Shaw against the refusal of justices at a special transfer session to grant him, under s. 14 of the Alehouse Act, 1828, a transfer or grant of his licence to sell exciseable liquors by retail to be drunk or consumed on the premises known as the Peacock Inn, Market Street, Halifax, which had been pulled down for certain public improvements, to another fit and convenient house in Market Street intended to be opened and kept by him as an inn.

From the affidavits the following facts appeared. In 1894 Mrs. Toole was the licensed proprietress of the Peacock Inn in Market Street, Halifax, and at the general annual licensing meeting in August of that year she applied for and obtained a renewal of her licence. In that year the corporation of Halifax acquired certain property, including the Peacock Inn, for the purpose of effecting certain public improvements in Market Street, and notice was duly given by the corporation to Mrs. Toole to determine her tenancy. On November 30 Mrs. Toole was about to quit the premises, of which Shaw had become tenant, though the origin and nature of his tenancy were not explained in the affidavits; and on that day Shaw applied, under 5 & 6 Vict. c. 44, at petty sessions for temporary authority to carry on the business of a licensed victualler at the Peacock Inn; this application was granted; and the authority remained in force till February 1, 1895. On December 7, 1894, Shaw applied for a transfer of the licence for the Peacock Inn to other premises over a mile away; this application was refused. On December 21, 1894, the furniture, &c., in the Peacock Inn was sold by auction, and the premises were immediately pulled down by the corporation. On February 1, 1895, Shaw applied at a special sessions under 9 Geo. 4, c. 61, s. 4, for a licence in respect of the Peacock Inn, and the application was granted; the licence so granted expired on October 10, 1895, and no application was made for its renewal; it was alleged, however, in the affidavits that at the adjourned annual licensing meeting on September 27, 1895, it was stated on behalf of Shaw that application would be made at a special session for a licence

to another fit and convenient house; but on this point the affidavits were conflicting. Subsequently notice was duly given by Shaw of his intention to apply under s. 14 of the Act of 1828 at a special session on June 24, 1896, for a transfer of the licence from the Peacock Inn, which had been pulled down, to another house in Market Street which he intended to open. The house not being completely built on June 24, the application was adjourned to July 29, 1896, when it was opposed by Messrs. Fowler on the ground that the licence was not required, and the application was refused on that ground. Shaw appealed to quarter sessions, where the objection was taken that no appeal lay, on the ground that the application on July 29 was in effect one for a new licence and not for a transfer, and the appeal was dismissed on that ground without going into the merits of the case. Shaw then obtained the present rule, which was served on Messrs. Fowler and the justices. (1)

*Lawson Walton, Q.C.*, and *T. P. Perks*, for the respondents, Messrs. Fowler, shewed cause. There was no right of appeal to the quarter sessions against the decision of the licensing justices.

(1) By 9 Geo. 4, c. 61 (The Alehouse Act, 1828), s. 4, special sessions are to be held, at which "it shall be lawful for the justices then and there assembled, in the cases and in the manner and for the time hereinafter directed, to license such persons intending to keep inns theretofore kept by other persons being about to remove from such inns, as they the said justices shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper persons, under the provisions hereinafter enacted, to be licensed to sell exciseable liquors by retail, to be drunk or consumed on the premises."

By s. 14, "If any person duly licensed under this Act shall [&c.], . . . or if any house, being kept as an inn by any person duly licensed as aforesaid, shall be or be about to be pulled down or occupied under the provisions of any Act for the improvement of the highways, or for any other public purpose, . . . . it shall be lawful for the justices assembled as aforesaid at a special session, holden under the authority of this Act, for the division or place in which the house so kept or having been kept shall be situate . . . . to grant to the person whose house shall as aforesaid have been or shall be about to be pulled down or occupied for the improvement of the highways, or for any other public purpose, . . . . and who shall open and keep as an inn some other fit and convenient house, a licence to sell exciseable liquors by retail, to be drunk or consumed therein. . . ."

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The right of appeal was originally given by s. 27 of the Alehouse Act, 1828 (9 Geo. 4, c. 61), to any person who should think himself aggrieved by any act of any justice done in or concerning the execution of the Act; but by Sched. II. of the Licensing Act, 1872 (35 & 36 Vict. c. 94), that section was repealed, except in so far as it related to "the renewal of licences or to the transfer of licences under sections 4 and 14 of the same Act"; that schedule therefore took away the right of appeal in the case of an application for a new licence. It is true that that schedule was itself repealed by the Statute Law Revision Act, 1883, but with the saving clause that where any enactment not comprised in the schedule to the Act had been already repealed by any enactment thereby repealed, such repeal was not to be affected by the repeal effected by that Act; the Act of 1828 is not mentioned in the schedule to the Act of 1883, and the repeal of s. 27 of the former Act so far as it affects applications for new licences still holds good. The application in the present case was in substance an application for a new licence, and not for a renewal or transfer of an existing licence. The provisions of s. 14 of the Act of 1828 are not confined to renewals and transfers, but extend to certain classes of applications for new licences, and it is only when the application is for a renewal or transfer within the meaning of that section and s. 4 that an appeal lies to quarter sessions. A transfer means a transfer of an existing licence of an existing house; where there is no such licence and no such house the application is one for a new licence under s. 14. In the present case the premises had been pulled down, and there was no existing licence which could be made the subject of a transfer.

[They referred to *Thornton* v. *Clegg* (1); *Freer* v. *Murray* (2); *Reg.* v. *Hughes.* (3)]

Secondly, the applicant was not a person entitled to apply under s. 14 of the Act of 1828. That section provides that where a house, being kept as an inn by any person duly licensed under that Act, is pulled down for a public purpose,

(1) (1889) 24 Q. B. D. 132. (2) [1894] A. C. 576.
(3) [1893] 2 Q. B. 530.

the justices may grant to the person whose house is pulled down, and who opens and keeps as an inn some other fit and convenient house, a licence to sell exciseable liquors by retail. To entitle a person to the benefit of that provision he must be duly licensed under that Act; the section does not give any right of application to the assigns of a person once licensed. The present applicant was not such a person; he was merely the holder of a temporary permission to sell intoxicating liquors before the premises were demolished, and he was not in such right a licensed person: *Price* v. *James*. (1) The transfer of February 1, 1895, to the applicant was a mere nullity, and gave him no rights as a licensed person.

[They also cited *Reg.* v. *Taylor* (2); *Reg.* v. *Rowell* (3); *Andrews* v. *Denton* (4); *Simpkin* v. *Birmingham Justices* (5); *Reg.* v. *Liverpool Justices*. (6)]

*Kershaw*, *Q.C.*, and *R. M. Montgomery*, in support of the rule, were directed to confine their argument to the second point.

The applicant is within the provision of s. 14 of the Act of 1828, which enables licensing justices to grant to a person whose house has been pulled down for public improvements a licence for some other house. The old house was kept as an inn until November, 1895, by Mrs. Toole or the applicant; it was, therefore, the kind of house contemplated by the section, for it was kept as an inn by the person duly licensed. There is nothing in the section requiring the application to be made by a person duly licensed at the time of the demolition, nor is there any decision to that effect. Even if the applicant was not himself duly licensed to keep the old house as an inn, he was interested in the house, and was entitled to apply for the equitable relief given by the section, for the expression "whose house" is wide enough to include the tenant as well as the owner. Sect. 14 contemplates a transfer not merely from one person to another, but also from one set of premises to another; and after the old premises had been abandoned by Mrs. Toole,

(1) [1892] 2 Q. B. 428.
(2) (1872) L. R. 7 Q. B. 487.
(3) (1872) L. R. 7 Q. B. 490.
(4) [1897] 2 Q. B. 37.
(5) (1872) L. R. 7 Q. B. 482.
(6) (1883) 11 Q. B. D. 638.

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the applicant was the proper person to apply for a transfer. The applicant was duly licensed for the purposes of s. 14 by reason of his having obtained the temporary authority under 5 & 6 Vict. c. 44. *Price* v. *James* (1) is distinguishable; that was the case of a person who held a temporary authority applying under s. 42 of the Licensing Act, 1872, for the renewal of "his" licence, he not having a licence capable of renewal.

*Roskill*, for the justices.

*Cur. adv. vult.*

Dec. 1. MATHEW J. This is an application for a mandamus to justices to hear and determine an application for a licence under 9 Geo. 4, c. 61, s. 14; both the licensing justices at special sessions and the Court of Quarter Sessions thought that the application was not properly made under that section, and therefore refused to hear it upon the merits. The facts are shortly these. Mrs. Toole was the licensed proprietress of the Peacock Inn at Halifax, the site of which was taken by the corporation of Halifax for the purpose of enlarging streets and the market-place; notice was given to Mrs. Toole to determine her tenancy, and the notice expired on November 30, 1894. She had obtained a renewal of her licence in the previous August. After November 30 the applicant, Shaw, according to the affidavits, became the tenant of the house; it does not appear from the affidavits that he paid rent to anybody, nor are the circumstances stated under which he became tenant. Probably there was a formal occupation of the house, looking at what followed; for, on behalf of a gentleman named Naylor, he applied on December 7, 1894, for the transfer of the licence to other premises at some distance from the Peacock Inn; that application was refused. On December 8 a sale of the effects at the Peacock Inn was advertised, and on December 21 it took place; the inn was then immediately pulled down, and possession of the site taken by the corporation. On February 1, 1895, Shaw applied to the justices for a licence under s. 4 of 9 Geo. 4, c. 61, and, strange to say, his application was granted. It was a nullity and a fiction, for the Peacock Inn had ceased

(1) [1892] 2 Q. B. 428.

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to exist, and a licence to carry on his business there was a licence to do that which could not be done; doubtless it was granted owing to an oversight. That licence was not renewed, nor indeed was any application for its renewal ever made. On July 29, 1896, the present application was made on behalf of Shaw. It appears that the corporation had arranged that a public-house should be built on or near the site of the Peacock, and Shaw, having placed himself in a proper position as far as these premises were concerned, made the application now under consideration for the grant of a licence to him under s. 14.

It is necessary in the first place to refer to s. 4 of the same Act, the section which deals with the transfer of licences. After directing that special sessions shall be held for the transfer of licences, it authorizes the justices in special sessions to license such persons intending to keep inns theretofore kept by other persons about to remove from such inn as they shall deem fit and proper persons; this provision is clearly not applicable to the case of Shaw. Then it was said that under s. 14 of that Act he was entitled to have a licence granted to him. That section, as has often been pointed out, is an extension of s. 4 and must be read with it. It is clear that Shaw does not come within the earlier portion of the section as a person duly licensed under the provisions of the Act; but it is said that he comes within the clause which provides for the case of a house which has been kept as an inn by any person duly licensed under the Act being pulled down under the provisions of any Act for the improvement of the highways, &c. Now, the section provides for the transfer of a licence to the same person in respect of different premises, and for the transfer to a different person in respect of the same premises. But Shaw was not a person duly licensed under the Act, and therefore was not entitled to apply under s. 14. It is true that upon going into occupation he had obtained a temporary licence, which does not appear to have been acted upon, to carry on business from November, 1894, to February, 1895, but that did not make him a licensed person under the Act, which seems to be an indispensable condition of the right to apply under this section. Mrs. Toole might possibly have made the application with success, but

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Shaw had no such title under her as enabled him to avail himself of the powers conferred by the section. I think, therefore, that the justices were right in refusing to go into the merits of the case on the ground that the application was really one for a new licence, and that the quarter sessions properly affirmed their decision. The rule will accordingly be discharged.

KENNEDY J. I entirely agree. The central point of the case is whether this was an application properly made under s. 14, so that an appeal lay. I am not satisfied on the affidavits that Shaw did in fact occupy the premises. He says that he "became tenant" of the house at some time before November 30, 1894; I do not, however, see any evidence that he actually occupied the premises before they were pulled down. Assuming, however, that he did, he never occupied them as the licence-holder under the Act. I agree with my brother Mathew's interpretation of s. 14, which I read as meaning that, in order to enable a person to apply under that section where a house is pulled down or about to be pulled down, the house must be kept as an inn at or up to the time of its being pulled down, and must be so kept by a person duly licensed. I further think that when in the latter part of the section a person is mentioned to whom the justices may grant a licence if he keeps another inn—may grant what is called a transfer, though it is not so called in the section—it must mean a person who is the licensed holder under the Act of the inn at the time of its demolition. If we construe the language of the section naturally, apart from all considerations of public convenience or justice, that must be the proper construction; for if it is not there would be the difficulty that a number of persons might compete with one another in making applications for a licence of the same premises. The applicant's counsel were unable to deal satisfactorily with this point; they endeavoured to shew that the refusal of the application involved a hardship upon the landlord; but the landlord, according to this view, is not the applicant, and unless we give some such interpretation to the expression "the person whose house as aforesaid shall have been or

shall be about to be pulled down," we should at once let loose, if I may use the expression, as competing applicants the landlord, an occupier in whose name the licence does not stand, and an occupier in whose name it does stand. To which of them, supposing they all applied, should the licence be granted? On that ground alone the natural and fair implication from the language of the section would seem to be that it must mean a definite person—that is, the person who is keeping a licensed house when it is about to be pulled down, and who subsequently qualifies for a licence by becoming the tenant and occupier of an inn, and prepared to carry on business there as an innkeeper if he gets a licence; he is the person who primâ facie is injured if his premises are pulled down for a public purpose. Therefore, as Shaw was admittedly not such a person, his application fails, for he does not bring himself within the words of the section as the person to whom a licence may be properly transferred in respect of the new premises.

*Perks*, for the objectors, applied for costs.

*Montgomery*, for the applicant. The licensing justices are not a court of summary jurisdiction: *Boulter* v. *Kent Justices* (1); and there is, therefore, no power to give costs to the objector.

*Perks*, in reply. The question is concluded by rule 61 of the Crown Office Rules, which provides that "notice is to be given by the order nisi for a mandamus to every person who by the affidavits on which the order is moved shall appear to be interested in or likely to be affected by the proceedings." The objectors were parties interested, were served with notice, and have appeared in pursuance thereof.

MATHEW J. The point is one of importance, and we will take time to consider it.

*Cur. adv. vult.*

1898. Jan. 22. The judgment of the Court (Mathew and Kennedy JJ.) was delivered by

KENNEDY J. The question remaining for our decision is whether costs can be awarded to one of the successful parties

(1) [1897] A. C. 556.

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who appeared in opposition to the application for a rule for a mandamus which it was proposed to make absolute. It was suggested on behalf of the unsuccessful applicant that, in view of the recent decision in the House of Lords of *Boulter* v. *Kent Justices* (1), we had no jurisdiction to give costs to that party who was the objector before the licensing justices. We have considered whether or not there has been introduced, by reason of that decision, a bar to our granting costs in such a case to a successful respondent, and we are of opinion that there is no such bar. In applications for a mandamus a discretion as to costs has always been exercised by the Court, and that discretion has, in the absence of special circumstances, generally been exercised in favour of a successful respondent if the Court has considered him to be a person who was bound to appear by reason of his interest in the question in dispute. The decision in *Boulter* v. *Kent Justices* (1) does not seem to us to interfere with that discretion so exercised. The present case is not one of a successful appellant to quarter sessions asking for an order that the objector, who has not appeared on the appeal, should pay the costs; here the party opposing the rule has appeared and has been heard and has an interest in the dispute, and we hold that he was justified in opposing the rule for a mandamus. Nothing in our judgment has occurred to alter the discretionary power vested in this Court in such cases, or to affect its right to grant these costs.

Solicitor for applicant: *John R. Hall, for Keighley Walton, Halifax.*

Solicitors for objectors: *Williamson, Hill & Co., for Walshaw, Halifax.*

Solicitors for justices: *Badham & Williams, for Trevor Edwards, Wakefield.*

(1) [1897] A. C. 556.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1898
*Feb.* 7.

## HALL *v.* LAUNSPACH.

*Mayor's Court, London—Practice—Costs—Libel—Less than* 5*l. recovered—Mayor's Court of London Act*, 1857 (20 & 21 *Vict. c. clvii.*), *s.* 11—*Rules of* 1890 *and* 1892.

The fact that in a particular case no scale of costs is provided by the Mayor's Court of London Rules, 1890, is not in itself sufficient to shew that that Court has no inherent jurisdiction to order costs in the cases not specifically provided for.

*Semble*, that in actions for libel tried in the Mayor's Court of London, in which less than 5*l.* is recovered, the Court has jurisdiction to order costs to be paid to the plaintiff, beyond court fees and allowances to witnesses, although no scale is provided by the rules for such a case.

APPEAL from an order of a judge at chambers prohibiting the Mayor's Court of London from proceeding in the matter of granting an allocatur for the amount of the plaintiff's costs, except in respect of specified matters.

The action was for libel, and was tried in the Mayor's Court with a jury, who found for the plaintiff with 50*s.* damages. The judge gave no certificate for costs, except that he certified for counsel. The judgment was entered for the damages and costs. The taxing officer allowed the plaintiff costs beyond the court fees and allowances to witnesses, and on appeal the judge refused to disturb the taxation. The defendant thereupon applied for a writ of prohibition, prohibiting the Court from further proceeding in the matter of granting an allocatur for the amount of the plaintiff's taxed costs, and from proceeding upon the judgment to enforce costs, except in respect of court fees paid and allowances to witness. Ridley J. made the order as prayed.

The plaintiff appealed.

1898. Jan. 24. *H. Reed, Q.C.*, and *H. Emanuel*, for the plaintiff, contended that the Mayor's Court had jurisdiction to make the order for costs. It is not disputed that this has been the practice, and the omission in the rules of any scale

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applicable to cases like the present does not take away the power to order costs. It lies upon the applicant for a writ of prohibition to establish that there is no jurisdiction to do the act complained of.

*Stephen Lynch*, for the defendant. There is a full provision in the Rules of 1890 and 1892 for scales of costs, of which there are several, and there is no other sanction for any scale. As none of the scales of costs apply to the present case, the registrar had no jurisdiction to make any order as to costs.

*H. Emanuel*, in reply.

*Cur. adv. vult.*

Feb. 7. CHITTY L.J. read the following judgment:—

This is an appeal by the plaintiff in an action in the Mayor's Court from an order of the judge in chambers directing a writ of prohibition to issue. The judge gave leave to appeal. The terms of the order are special. The writ is to prohibit the Court from further proceeding in the matter of granting an allocatur for the amount of the plaintiff's taxed costs, as taxed upon a judgment for 2*l.* 10*s.* and costs obtained by him in the action, and of proceeding upon the judgment to enforce costs except in respect of court fees paid and allowances to witnesses. The sole question, then, is whether the Mayor's Court had jurisdiction to order any costs to be paid to the plaintiff beyond court fees and allowances to witnesses.

The action was for a libel. It was not, and could not, be disputed that the Mayor's Court have jurisdiction to try such an action (see s. 11 of the Mayor's Court Act, 1857). The action was tried before a judge with a jury. The jury found a verdict for the plaintiff with 50*s.* damages. The judge gave no certificate as to costs, except that he certified for counsel. The judgment was entered for the damages and costs. The registrar, who is the taxing officer, allowed to the plaintiff costs beyond the court fees and allowances to witnesses. The defendant brought the registrar's allocatur before the judge for review of the taxation on the point now in question. But the judge refused to disturb the taxation. It was in these circumstances that the defendant applied for the prohibition. The burden of

shewing want of jurisdiction rests on the party applying for the prohibition (see *Taylor* v. *Nicholls* (1)). The contention of the defendant was that, if the Mayor's Court had an ancient jurisdiction to give costs, it had lost it or been deprived of it by the rules now in force in that court. The question of ancient jurisdiction was touched upon slightly, but was not seriously argued, by the defendant's counsel. He entirely failed to satisfy us that the Court had no such jurisdiction. It was conceded that it was the practice of the Court to give costs. In the absence of anything to the contrary, the presumption arising from the practice would be in favour of the jurisdiction. The presumption is supported by the 11th section of the Act of 1857 (already referred to), which assumes the jurisdiction to give costs. The effect of the section stated shortly, and so far as is material for the present question, is that if in an action founded on contract the plaintiff shall recover less than 5*l*., or if in an action in tort, except certain specified actions among which exceptions is an action for libel, the plaintiff shall recover less than 40*s*., the plaintiff shall have no costs unless the judge certifies that there was sufficient reason for bringing the action in the Mayor's Court. This negative but limited enactment takes away the jurisdiction of the Court as to costs which it presupposes, but in certain special cases only; it does not take it away in such an action as the present, because this is an action for libel, and the plaintiff has recovered more than 40*s*. damages.

The presumption, then, being that the jurisdiction existed down to the passing of the Act of 1857, and the defendant having failed to prove the want of original jurisdiction, the only remaining question is whether the jurisdiction has been taken away by the Rules of Court passed for the regulation of the practice and procedure of the Court. The subsisting rules are those of 1890 and 1892. These rules were made by the Mayor's Court under the 45th section of the Act of 1857, and were sanctioned by the Rule Committee under the provisions of the Judicature Act, 1884, s. 24. The 1st rule of 1890 runs thus: "In every action or matter in the Mayor's Court al

(1) (1876) 1 C. P. D. 242.

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Chitty L.J.

costs shall be taxed by the registrar of such court according to the scales of fees and costs set out in the schedules hereto annexed, subject to the review of such taxation by one of the judges of the court." There are two schedules. Sched. A relates to fees of court. Sched. B relates, firstly, to costs where the amount recovered exceeds 5*l.* and is less than 10*l.*, and prescribes that the only costs (exclusive of court fees) to be allowed in that case shall be those specified. It then prescribes that "the following costs only, exclusive of court fees," shall be allowed where the amount recovered is 10*l.* and upwards, and it there sets forth in a tabular form three scales, the first where the amount is under 20*l.*, the second where it is 20*l.* and under 50*l.*, and the third where it is 50*l.* and above. It is plain then, in my opinion, that there is no scale of costs (exclusive of court fees) applicable when the amount recovered is 5*l.* or under 5*l.*—in other words, that there is no scale of costs which applies to the present case. There is no rule among those of 1890 or 1892 to the effect that no costs shall be allowed other than those for which scales are prescribed. I think that the 1st rule of 1890, that all costs shall be taxed according to the scales of costs, is confined to cases where the scales apply; and that, where the scales do not apply, the taxation is left unfettered. The 1st rule of Order VIII. of the Rules of 1892 is founded on the lines of Order LXV., r. 1, of the Rules of the Supreme Court. It provides that, subject to the provisions of s. 11 of the Mayor's Court Act, 1857, and of s. 117 of the County Court Act, 1888, costs of proceedings in the court shall be in the discretion of the Court. This is followed by a proviso as to the costs of trustees, and by a proviso that where the action is tried with a jury "the costs" shall follow the event, unless the judge shall for good cause otherwise order. The costs in the second proviso mean costs according to the scales where they apply. The references to the 11th section of the Act of 1857, and to the 117th section of the County Court Act, 1888, subject to which the discretion over costs is exercisable, are material. The provisions of these enactments were plainly within the view of the authorities who framed and sanctioned the rules. As already pointed out, the

11th section precludes the allowance of costs where the sum recovered in tort does not exceed 40*s.* in the cases to which it applies, and it does not apply at all in the case of libel, even where the sum recovered is less than 40*s.*

The other cases of tort excepted from the 11th section are malicious prosecution, slander, criminal conversation, and seduction; so that in these cases as well as libel the Legislature thought fit to leave the jurisdiction of the Mayor's Court wholly unfettered, although the amount recovered did not exceed 40*s.*

The provisions of s. 117 of the County Court Act, 1888, do apply to the Mayor's Court, but they do not touch this case, because the action could not have been brought in a county court, such Court having no jurisdiction to try a libel action.

But the 11th section and the 117th section shew that where it is intended to take away a jurisdiction as to costs, plain and direct words are used. There are no such words in the Rules of 1890 and 1892. It is difficult to suppose that the Mayor's Court in framing the existing rules, or the Rule Committee in sanctioning them, intended to take away the jurisdiction by inference: and it is on inference only that the defendant's argument on the effect of the rules is founded.

For these reasons I think that the argument cannot be sustained. It would seem advisable that the rules should be amended by providing a scale of costs to cover cases like the present.

The appeal must be allowed.

COLLINS L.J. read the following judgment:—

The burden of proving want of jurisdiction in the Mayor's Court is on the defendant in this case. He claims to have discharged it by contending that the Mayor's Court takes jurisdiction to award costs by virtue of the Rules of 1890 and 1892 only, and that as these rules contain no schedule of costs applicable to cases when 5*l.* or under is recovered, except in respect of court fees and expenses of witnesses, there was no jurisdiction in the present case when 2*l.* 10*s.* only was

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recovered to award costs other than those coming under either of these heads.

If the initial step were established that the Mayor's Court had no jurisdiction except under these rules, there would be force in this argument. But if such jurisdiction existed before the rules came into operation, the argument would have to be pushed to the extent of contending that the new rules cut down a previously existing jurisdiction—a much more difficult contention. The points relied on are these :—

Rule 1, costs and fees, 1890, provides: "In every action or matter in the Mayor's Court, all costs shall be taxed by the registrar of such court according to the scale of fees and costs set out in the schedules hereto annexed, subject to the review of such taxation by one of the judges of the court." Sched. B provides a scale of costs where the amount recovered is over 5*l.* and under 10*l.*, and other scales where it is 10*l.* and upwards, but under 20*l.*; 20*l.* and under 50*l.*; and over 50*l.*; and enacts that the specified costs only (exclusive of court fees) shall be allowed in each case.

Order VIII., r. 1, which is equivalent to Order LXV., r. 1, of the High Court Rules, provides that in cases tried by a jury the costs shall follow the event, unless the judge by whom such action is tried or the Court shall for good cause otherwise order. No order was made in this case, and it is said that the event is that an amount has been recovered for which no scale is provided, and that therefore no costs other than court fees and witness expenses can be allowed on taxation. I am of opinion that these provisions, though they do not confer jurisdiction, are not sufficient to take it away if it existed. I think rule 1, fees and costs, 1890, means no more than that the registrar shall tax the costs according to the scale applicable thereto. In cases where a scale is provided he must tax under it, but where none is provided he is left with his original jurisdiction, if he had any. As I have said, the burden of shewing want of such jurisdiction is on the respondent. He has wholly failed to satisfy me that such jurisdiction did not exist. On the contrary, he had to admit that it has always been exercised, and at least one enactment was referred to in which the Legis-

lature has treated it as existing. Sect. 11 of the Mayor's Court Act, 1857, which provides that a plaintiff recovering a sum not exceeding 5*l.* in contract and 2*l.* in tort shall have no costs unless the judge shall certify that there was sufficient reason for bringing the action in the court, presupposes that but for such enactment costs could be recovered in such a case. Furthermore, when the judge did certify, the registrar must have had jurisdiction to tax the amount. Actions of libel such as the present (in which, moreover, more than 2*l.* was recovered) are excepted out of the enactment. It seems obvious that the Legislature intended that a judge's certificate should not be a condition precedent to the recovery of costs in such cases, and assumed that they could be recovered without it. The two county court provisions affecting this matter, namely, formerly s. 29 of the Act of 1867, and now s. 117 of the Act of 1888, do not apply to libel; therefore the jurisdiction to tax costs in such cases, if it existed before, is not affected by that legislation. These considerations, if they do not conclusively establish the fact of such jurisdiction, are sufficient in my judgment to found a strong presumption of its existence, which is sufficient for the decision of the present case.

It is not necessary, therefore, to embark on the inquiry how the jurisdiction as to costs in this—one of the most ancient courts in the realm—came into existence.

I have said that I do not think the Rules of 1890 and 1892 are so worded as to destroy the jurisdiction of the Mayor's Court to allow costs in cases where no scale is provided, assuming such jurisdiction to have existed. But I think it must be assumed that the framers of those rules could not have intended to depart, in the case of the Mayor's Court, from the general policy of the Legislature in dealing with inferior courts other than county courts, as shewn by the 117th section of the County Courts Act, 1888. For whereas by the 116th section persons who bring in the superior court actions which might have been brought in the county court, and recover only the smaller amounts named, are penalised by being deprived of all costs, those who recover like amounts in inferior courts in similar actions which might have been brought in the county

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court are, by s. 117, merely limited to county court costs. It would be a somewhat startling conclusion if we are to suppose that the Rule Committee not only intended to deprive suitors in the Mayor's Court of this right thus preserved for suitors in other inferior courts, but should go one step further, and deprive them of all costs in a case excepted from this legislation altogether, being one that could not have been brought in the county court.

*Appeal allowed.*

Solicitors for plaintiff: *Emanuel, Round & Nathan.*
Solicitors for defendant: *Swepstone & Stone.*

A. M.

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[IN THE COURT OF APPEAL.]

## *In re* HUMPHREYS. *Ex parte* LLOYD-GEORGE & GEORGE.

*Solicitor—Costs—Charging Order—Property Recovered or Preserved—Bankruptcy—Jurisdiction—Discretion—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Bankruptcy Rules*, 1886, *r.* 125.

To bring a case within s. 28 of the Solicitors Act, 1860, property must be recovered or preserved in a proceeding in a court of justice.

The appellants were the solicitors to the trustee of a bankrupt's estate. The bankrupt had sold his stock-in-trade, and gone with the proceeds of the sale to Australia. He was arrested there, and brought back to this country on a charge of offences against the Debtors Act, 1869, preferred by order of a court of bankruptcy made under s. 16 of that Act upon the application of the appellants on behalf of the trustee. On the bankrupt's arrest a sum of money, the proceeds of the before-mentioned sale, was found upon him, and taken possession of by the Australian police. Under a power of attorney prepared by the appellants, as solicitors to the trustee, this money was handed over by the police and remitted to the appellants in this country:—

*Held*, that this money was not property recovered or preserved in the bankruptcy proceedings or any other legal proceeding within the meaning of s. 28 of the Solicitors Act, 1860, and therefore that an order could not be made under that section, charging the appellants' costs upon it.

The power given by the section is discretionary, and, *semble*, the cases in which it ought to be exercised by a court of bankruptcy must be rare.

APPEAL from the judgment of a Divisional Court (Wright and Kennedy JJ.) allowing an appeal against an order made by

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the judge of the county court of Carnarvonshire, sitting in bankruptcy, as after mentioned.

The bankrupt, who was a farmer and horse-dealer, had sold his horses, and gone to Australia with the proceeds of the sale. He was subsequently adjudicated bankrupt in the county court on a creditor's petition, and a trustee in bankruptcy was appointed. The appellants, Messrs. Lloyd-George & George, who had acted as solicitors to the petitioning creditor, were appointed solicitors to the trustee. The bankrupt was arrested in Australia and brought back to this country on a charge of forgery, and a charge of offences against the Debtors Act, 1869, ss. 11, 12, preferred by order of the county court judge, sitting in bankruptcy, made under s. 16 of the Act upon the application of the appellants on behalf of the trustee. Upon the bankrupt's arrest a sum of 813*l.*, the proceeds of the sale of his stock as aforesaid, was found upon him, and taken possession of by the Australian police. The bankrupt on being brought to this country was charged with the above-mentioned offences before the magistrates, who dismissed the charge of forgery, but committed him on the charge of offences against the Debtors Act, 1869, to the quarter sessions, where he was afterwards tried and acquitted. Under a power of attorney prepared by the appellants, acting as solicitors to the trustee, the balance of the sum of 813*l.*, after deducting certain expenses, was handed over by the Australian police and remitted to the appellants. The county court judge upon a petition presented by the appellants made an order under s. 28 of the Solicitors Act, 1860, declaring that the sum of money remitted to them as above mentioned had been recovered and preserved for the bankrupt's estate through the instrumentality of proceedings instituted by the petitioners on behalf of the trustee in bankruptcy, and that the costs, charges, and expenses of the petitioners of and incidental to the recovery and preservation thereof, including the costs and expenses of the petitioners in procuring the arrest of the bankrupt, and the costs and expenses of the proceedings taken before the justices preliminary to and consequent upon such arrest, and of the petition and the parties properly appearing thereon, should be taxed and paid out of the

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money recovered and preserved as aforesaid. The solicitors had delivered to the trustee a cash account, in which, after deducting various sums in respect of the costs of the prosecutions and other matters, they shewed a balance of 323*l.* 4*s.* payable to the trustee in bankruptcy, but they had not delivered a bill of costs to the trustee, though they had been requested to do so in September, 1896. The trustee in bankruptcy having appealed against the order of the county court judge, the Divisional Court set aside his order. The solicitors appealed.

Feb. 11, 12. *Robson, Q.C.*, and *S. T. Evans*, for the appellants. The county court judge, sitting in bankruptcy, had jurisdiction to make the charging order, and was right in making it. The money charged was recovered through the exertions of the appellants, acting as solicitors to the trustee in bankruptcy, in the course of the administration of the estate in bankruptcy, and in consequence of the order made in the bankruptcy proceedings for the prosecution of the bankrupt. It was, therefore, property recovered and preserved in or through the bankruptcy proceedings within the meaning of s. 28 of the Solicitors Act, 1860. It is not contended that the costs of the prosecution for forgery can be charged upon the money under s. 28.

Apart from any charge under the statute, the appellants are entitled to a lien on the money at common law, and the order may be supported on that ground.

[They cited *Guy* v. *Churchill.* (1)]

*Herbert Reed, Q.C.*, and *A. H. Carrington*, for the trustee. To come within s. 28 of the Solicitors Act, 1860, the property must be recovered or preserved in a suit, matter, or other legal proceeding, the object of which is the recovery or preservation of it. It is not enough that some legal proceeding has indirectly led to the recovery or preservation of the property. A criminal proceeding is not within the section, though it may indirectly lead to the recovery of property. The Court to make the charging order under the section is the Court before which

(1) (1887) 35 Ch. D. 489.

the suit, matter, or proceeding is heard or depending. The money in question here cannot be said to have been recovered or preserved in the bankruptcy proceedings, and therefore the county court judge had no jurisdiction to make the order. Sect. 28 cannot be applied to bankruptcy proceedings, for by rule 125 of the Bankruptcy Rules, 1886, a certain order of priority in the payment of costs and charges out of the estate is prescribed, and the effect of a charging order under s. 28 would be to vary that order. The power given by s. 28 is discretionary, and, assuming that there was jurisdiction, the order ought not under the circumstances to have been made: *Greer* v. *Young*. (1)

There is no question of a common law lien in the present proceedings. Besides, such a lien as claimed can only exist on money belonging to the client. The beneficial interest in this money does not belong to the trustee in bankruptcy, but to the creditors.

*S. T. Evans*, in reply.

*Cur. adv. vult.*

March 3. The judgment of the Court (A. L. Smith L.J., Chitty L.J., and Collins L.J.) was read by

CHITTY L.J. This is an appeal from the order of the Divisional Court discharging an order dated November 10, 1896, made by the county court of Carnarvonshire sitting in bankruptcy.

The appellants are a firm of solicitors who obtained the order in the county court. It was made on their petition for a charging order under the provisions of s. 28 of the Solicitors Act, 1860. The order declared that the sum of 813*l.* mentioned in the petition had been recovered and preserved for the bankrupt's estate through the instrumentality of proceedings instituted by the petitioners on behalf of the trustee in bankruptcy, and ordered that the costs, charges, and expenses of the petitioners of and incidental to the recovery and preservation of the 813*l.*, including the costs and expenses of the petitioners in procuring the arrest of the bankrupt and the costs and expenses

(1) (1883) 24 Ch. D. 545.

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of the proceedings taken before the justices preliminary to and consequent on such arrest, and of the petition and the parties properly appearing thereon, should be taxed and paid out of the 813*l.* recovered and preserved as aforesaid.

The bankrupt, a horse-dealer, had absconded to Australia, taking with him the sum of 813*l.*, proceeds of the sale of his horses, and the property of his creditors under the bankruptcy. Two criminal charges were made against him. The first was for forgery, and in this matter the appellants acted as solicitors for his father. Although they introduced charges against the trustee in their cash account for proceedings on this charge, the appellants do not now seek to have these charges paid out of the bankrupt's estate. The other criminal charge was for offences against the Debtors Act, 1869. In respect of this charge the county court judge, on an application made by the appellants on behalf of the trustee, whose solicitors they then were, directed the trustee to prosecute the bankrupt by order made in April, 1895. To this order s. 166 of the Bankruptcy Act, 1883, applied, and thereupon it became the duty of the Director of Public Prosecutions to institute and carry on the prosecution. The object of the enactment appears to be to save the bankrupt's estate from the costs of the prosecution. The bankrupt was arrested in Australia on the criminal charges and brought to this country; he was afterwards discharged by the justices on the charge of forgery, and was tried and acquitted on the charge under the Debtors Act, 1869. At the time of his arrest he had on him the sum of 813*l.*, which was taken from him by the police authorities. The balance of this sum, amounting to upwards of 700*l.*, was remitted to the appellants by virtue of a power of attorney prepared by them on behalf of the trustee in bankruptcy. The appellants have retained in their own hands the money thus received. They delivered to the trustee a cash account, in which they sought to deduct large sums in respect of the costs of the prosecutions and other matters, some of which it is admitted they are not entitled to claim. The account shewed a balance of 323*l.* 4*s.* payable to the trustee. Although they had been requested to deliver a bill of costs to the trustee in September, 1896, they had not done

so before the charging order was made. In fact, they have not now delivered their bill of costs.

It was contended on behalf of the appellants that they were entitled to retain the money on two grounds—first, by virtue of the charging order, and, secondly, by virtue of a lien they claimed as solicitors.

As to the charging order, I think it ought not to have been made. Sect. 28 of the Solicitors Act, 1860, is to the effect that in every case in which a solicitor is employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the Court or a judge before whom any such suit, matter, or proceeding has been heard or shall be depending to declare such solicitor entitled to a charge upon the property recovered or preserved. "Property recovered or preserved" means property recovered or preserved in any suit, matter, or proceeding in any court of justice. Obviously the proceeding must be in a civil court of justice. The enactment does not extend to criminal proceedings. In a criminal proceeding, instituted as it is for the punishment of the offender, no property is recovered or preserved. The only possible exception which occurs to us is an order made after conviction by the judge for restitution of the property to the owner under the provisions of the Acts relating to larceny and other similar offences (24 & 25 Vict. c. 96, s. 100; 35 & 36 Vict. c. 93, s. 30). If that be an exception—a point on which it is not necessary to express any opinion—the only costs for which a solicitor could obtain a charging order would be the costs of obtaining the order for restitution. In the case before us the money received by the appellants was not recovered or preserved in any civil proceeding in a court of justice. It was received merely by virtue of the power of attorney. It was contended that it was recovered in the proceedings in the bankruptcy. The answer is, it was not. The only colour for the argument was the order directing the prosecution. This point is covered by what we have said as to criminal proceedings, coupled with the fact that the money was not recovered by virtue of that order, although the order may have led indirectly to the recovery.

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To these reasons against the charging order we add the following. The jurisdiction under s. 28 of the Act of 1860 is discretionary. We entirely agree with the opinion expressed by Bowen L.J. in *Greer* v. *Young* (1), where he said that "the Act gives a discretionary power to the Court; the solicitor has no absolute right to the charge, but only power to ask the Court in the exercise of its discretion to make the charge." Without going so far as to say that the Bankruptcy Court ought never to make a charging order in favour of the solicitor to the trustee upon the funds which belong to the creditors, we think that the cases in which the discretionary power ought so to be exercised must be rare. In the circumstances of this case we think that the discretion was wrongly exercised. There is great force in the observations made by Wright J. on rule 125 of the Bankruptcy Rules regulating the priority of costs and charges payable out of the estate. Still there may be occasions on which it would be right to make the order, seeing that the ordinary right of the solicitor to be paid for his services out of the estate is only through the right of the trustee to obtain the costs out of the estate—a right which the trustee may have lost by reason of his being a defaulter or by his misconduct in which the solicitor is not implicated (see *Ex parte Harper* (2)). For these reasons we think that the Divisional Court were right in reversing the charging order.

The point as to the solicitor's lien, apart from the Act, does not appear to have been raised in the Divisional Court. It may be disposed of in a few words. The petition was not founded on lien; it was simply for a charging order. The solicitor to the trustee, whether in bankruptcy or in the case of an ordinary trust, has no lien on the trust estate. The trust estate in bankruptcy does not belong to the trustee; in equity it is the property of the creditors. The right of the solicitor to be paid out of the bankrupt's estate is only through the right of his client, the trustee. He has no independent right (see *Ex parte Harper* (2)). No doubt a solicitor employed by the trustee with respect to the trust estate is not uncommonly called or calls himself solicitor to the estate; but this is a misnomer.

(1) 24 Ch. D. 545, at p. 557. (2) (1882) 20 Ch. D. 685.

The law on this subject is well stated by North J. in *Staniar* v. *Evans.* (1)

Unfortunately for themselves, the appellants have pursued a mistaken course. It was their duty to pay the money to the trustee and to deliver a bill of costs, and to have taken steps for the taxation of the bill at the proper time. At the conclusion of the argument their counsel stated that they would now follow this course. Nothing which has fallen from us will in any manner prejudice them on the taxation. The respondent submits that on the delivery of the bill it should be taxed, and all proper costs and charges should be allowed. There is no undertaking on either side. The appeal must be dismissed with costs.

*Appeal dismissed*

Solicitors for appellants: *Lloyd-George & Co., for Lloyd-George & George, Portmadoc.*

Solicitors for trustee: *Saffery, Huntley & Son, for Breese, Jones & Casson, Portmadoc.*

(1) (1886) 34 Ch. D. 476, 477.

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[IN THE COURT OF APPEAL.]

## SPOONER *v.* BROWNING AND OTHERS.

*Principal and Agent—Authority—Holding out Person as having Authority—Evidence for Jury—Stockbroker—Course of Business.*

The defendants, a firm of stockbrokers, had in their employ a clerk, to whom they allowed commission upon orders introduced by him to them and accepted by them, but who was not authorized himself to accept orders on their behalf. On three occasions the plaintiff gave orders to the clerk for the purchase of shares by the defendants on the plaintiff's behalf, which orders were transmitted by the clerk to the defendants, who executed them and sent to the plaintiff bought notes in respect of the shares so purchased. No intimation was given by the defendants to the plaintiff that they accepted the orders prior to their execution by the defendants. In payment of the price of the first two lots of shares purchased the plaintiff drew a cheque payable to defendants' order which he gave to the clerk, who delivered it to the defendants. The third lot of shares was paid for by the plaintiff in a similar manner, with the exception that the cheque was drawn to the order of the clerk. The defendants received the cheques and credited the plaintiff with the amount of them. Orders for the purchase of other shares by the defendants were subsequently given by the plaintiff to the clerk, who did not transmit them to the defendants, but made out and handed to the plaintiff bought notes purporting to shew purchases of shares in pursuance of the orders, and to be signed by the defendants, which were forgeries. The plaintiff gave him cheques for the supposed prices of the shares, which he misapplied to his own use:—

*Held* (by A. L. Smith L.J. and Chitty L.J., Collins L.J. dissenting), that upon the above-mentioned facts there was no evidence for a jury of a holding out by the defendants to the plaintiff of the clerk as authorized to enter into contracts on their behalf, and, therefore, the defendants were not liable in respect of the orders subsequent to the first three.

APPEAL from the judgment of Hawkins J. upon further consideration in an action tried before him with a special jury.

Statement of claim alleged—(1.) that the defendants were a firm of stockbrokers carrying on business in the City of London; (2.) that on various dates between February, 1895, and February, 1896, the plaintiff employed the defendants by and through one Dennis, their clerk and agent, to make purchases and sales of shares for him, and the defendants accepted the said employment, and rendered to the plaintiff contracts and accounts

under which they purported to have bought and sold shares in pursuance of their said employment: (Then followed particulars of accounts of alleged purchases and sales, shewing a balance in plaintiff's favour); (3.) that the plaintiff from time to time paid the defendants the moneys required to enable them to pay for and take up and obtain delivery of the said shares and transfer the same into his name; (4.) that the defendants detained the certificates or other documents of title of the said shares, or, alternatively, that they had converted the same to their own use; (5.) alternatively, that the defendants had committed breaches of the contracts set out in paragraph 2 in that, if they purchased the said shares, they neglected and refused to complete their said contracts by procuring and delivering to the plaintiff transfers and certificates for the same shares, or in that, if they had not purchased the said shares for the plaintiff, they had been guilty of negligence and breach of duty in not having done so; (6.) that the said shares had risen considerably in value.

The plaintiff claimed—(1.) specific performance of the said contracts, and that the defendants might be ordered to purchase and transfer to him the said shares; (2) alternatively, an order for the delivery up to the plaintiff of the certificates or other documents of title to the said shares; (3.) alternatively, damages.

At the trial the following facts were proved.

The defendants, who were stockbrokers, had had in their employment as clerk at a salary of 60*l.* per annum a young man named Dennis who was in his twenty-first year and was a friend of the plaintiff's. They allowed Dennis a commission upon business introduced by him to them and accepted by them. On February 11, 1895, the plaintiff gave him two orders to be transmitted to the defendants, one being for the purchase by the defendants for the plaintiff of five Wolhuter shares, and the other for the purchase by the defendants for the plaintiff of ten Mainland Consolidated shares. Dennis transmitted these orders to the defendants, who executed them, and sent to the plaintiff through Dennis bought notes signed by them in respect of the same. Before executing the first order, one of

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the defendants made inquiries of Dennis as to the position of the plaintiff. On February 25 the plaintiff sent to the defendants through Dennis a cheque drawn by him payable to the defendants' order for the prices of the shares so purchased amounting to 35*l.* 8*s.* 6*d.* The price of the Mainland Consolidated shares not being then as yet payable, the defendants gave their cheque for the amount thereof, namely, 7*l.* 6*s.*, drawn in favour of the plaintiff, to Dennis to be by him handed to the plaintiff. This cheque did not appear to have reached the plaintiff. On March 8, 1895, the plaintiff gave to Dennis a third order to be transmitted to the defendants for the purchase by the defendants for the plaintiff of a hundred Idaho shares. Dennis transmitted this order to the defendants, who executed it and sent to the plaintiff through Dennis a bought note signed by them in respect of the same. Upon March 19, 1895, the plaintiff drew a cheque for the price of these shares, namely, 17*l.* 16*s.* 2*d.*, payable to Dennis's order, and gave this cheque to Dennis to be handed by him to the defendants. Dennis duly handed this cheque to the defendants. The defendants did not, prior to executing any of these orders, give any intimation to the plaintiff that they accepted the same. No communications took place directly between the plaintiff and the defendants either by letter or word of mouth with reference to these transactions. Subsequently to these transactions, during the year 1895, the plaintiff gave Dennis, who remained in the defendants' employ, orders for the purchase of other shares by the defendants for the plaintiff. Dennis did not transmit these orders to the defendants, but forged bought notes purporting to shew purchases of shares in pursuance of the orders, and to be signed by the defendants, and handed them to the plaintiff. The plaintiff drew cheques payable to Dennis's order for the different amounts supposed by him to be due to the defendants as the prices of the shares, and gave them to Dennis to be handed to the defendants. These cheques Dennis misapplied to his own use. The defendants did not dispute that the transactions with regard to the first three lots of shares purchased were binding on them, but denied any liability with regard to the subsequent orders for the purchase of shares, alleging that

Dennis was not their agent or authorized to bind them by contracts. The learned judge left to the jury three questions to which they returned answers as follows: (1.) Had Dennis express authority to enter into contracts on behalf of the defendants?—Answer: No. (2.) If he had no such authority, did the defendants hold him out, or permit him to represent himself as possessing such authority, i.e., to enter into contracts on defendants' behalf?—Answer: Yes. (3.) Had the plaintiff authorized Dennis to deal with the defendants' firm, so as to bind the plaintiff by payments made by the defendants to Dennis?—Answer: No. The learned judge on further consideration held that there was no evidence for the jury on question 2, and gave judgment for the defendants on the plaintiff's claim in respect of the shares for the purchase of which the plaintiff had given orders to Dennis subsequently to the third order. (1)

The plaintiff appealed.

*Crump, Q.C.*, and *J. E. Bankes*, for the plaintiff.

*J. Lawson Walton, Q.C.*, and *McIntyre*, for the defendants.

The arguments sufficiently appear from the judgments.

*Cur. adv. vult.*

Feb. 23. The following judgments were read:—

A. L. SMITH L.J. This is an action brought by the plaintiff, who is a farmer, against a firm of stockbrokers, in substance to recover moneys paid by the plaintiff to a person named Dennis on account, as the plaintiff supposed, of the price of shares purchased by the defendants for him, which shares have not been delivered by the defendants to him.

The case came to trial before my brother Hawkins and a

(1) There had been sales by the defendants on behalf of the plaintiff of the shares included in the first three orders, and the defendants had while denying liability paid a sum of money into court to cover any balance that might be due from the defendants to the plaintiff on account thereof; and upon the answer of the jury to the third question it became necessary to take an account to ascertain whether the money so paid into court was sufficient. The learned judge said that the case must come before him again or be referred for that purpose.

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A. L. Smith L.J.

special jury, when the learned judge, doubting whether he should do so, left the following three questions to the jury: (1.) Had Dennis express authority to enter into the contracts?—Answer: No. (2.) Did the defendants hold him out, or permit him to represent himself, as possessed of such authority—i.e., to enter into contracts on defendants' behalf?—Answer: Yes. (3.) Had the plaintiff authorized Dennis to deal with the defendants, so as to bind the plaintiff by payments to Dennis?—Answer: No. My brother Hawkins, subsequently, after argument, entered judgment for the defendants upon the ground that there was no evidence to support the second finding of the jury. The plaintiff appeals.

The question comes to this: Should my brother Hawkins upon the evidence have held that there was no evidence to go to the jury upon the second question?

The evidence, so far as material to the point under consideration, shews this. Dennis was a junior clerk of the defendants, who received a commission upon business introduced by him to them. Dennis was known to the plaintiff as a friend. Upon February 11, 1895, the plaintiff gave him an order to take to the defendants to be executed by them. It was an order to purchase for the plaintiff five Wolhuter shares. This order Dennis took to the defendants, who executed it, and the plaintiff afterwards received from the defendants a bought note signed by them, shewing the purchase of these shares by them for him. This note was sent by the defendants to the plaintiff by Dennis. On the same day the plaintiff gave a similar order through Dennis for the purchase by the defendants for the plaintiff of ten Mainland Consolidated shares. This order Dennis took to the defendants, who executed it, and the plaintiff afterwards received through Dennis a bought note signed by the defendants, shewing the purchase of these shares by the defendants for the plaintiff. After the receipt of these notes from the defendants, the plaintiff, upon February 25, 1895, drew his cheque in favour of the defendants for the price of these two lots of shares, amounting to 35*l.* 8*s.* 6*d.*, which cheque he gave to Dennis that he might hand it to the defendants. This Dennis did, and these two transactions are duly

entered in the defendants' ledger. Upon March 8, 1895, the plaintiff gave a third order to Dennis to be taken to the defendants, for them to purchase for the plaintiff 100 Idaho shares. This order Dennis also took to the defendants, who executed it, and afterwards sent through Dennis to the plaintiff a bought note signed by them, shewing the shares purchased by them for him. Upon March 19, 1895, the plaintiff drew his cheque for the amount of these shares, namely, 17*l.* 16*s.* 2*d.*, in favour of Dennis, and gave it to Dennis to hand to the defendants, which he did. This transaction was also entered in the defendants' books, and these matters thus became closed.

After these three transactions, and throughout the year 1895, the plaintiff gave Dennis, who still remained the defendants' clerk, orders for the purchase of other shares, to be taken by him to the defendants for execution. Dennis took none of these orders to the defendants. What he did was this. He made out bought notes purporting to be signed by the defendants, and handed them to the plaintiff. These were forgeries of Dennis. The plaintiff, upon the receipt of these forged bought notes, drew cheques for the different amounts supposed by him to be due to the defendants, and handed them to Dennis to be taken to the defendants. These cheques Dennis misapplied to his own use. The defendants knew nothing of these orders of the plaintiff, or of what Dennis was doing till the beginning of the year 1896.

It is not suggested that the plaintiff was guilty of any negligence in not finding out that the bought notes he received from Dennis from time to time did not bear the genuine signatures of the defendants, nor that the defendants were guilty of any negligence in not discovering Dennis's frauds. Both the plaintiff and the defendants were equally cheated by Dennis.

The question is narrowed to this. Does the fact of a principal allowing an agent to obtain orders for him which he may or may not execute as he pleases, as the person giving the order well knows, afford any evidence that he holds out the agent as having authority either to bind him by contracts, or to represent that he, the principal, will execute the orders brought to him by the agent?

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Now it is clear that, upon receipt of the first order brought by Dennis to the defendants, they were perfectly entitled to refuse to execute it, and they were under no obligation whatever to communicate to the plaintiff whether they would execute the order or not. If they had not executed this order, it cannot be said that their legal position would have been different when the second or any subsequent order came through Dennis to them, assuming that they had not executed any of these orders. But it is said that, because they executed the first order (and in this case the two subsequent orders), their position became altered, and that by executing these orders they thereby held out the agent as having authority as regards subsequent orders to bind them by contracts, or at any rate held him out as representing that they (the defendants) would execute the orders thereafter brought to them by him, unless they communicated to the plaintiff that they would not execute the order so brought. When, I would ask, is it that this legal obligation upon the principal to communicate to the customer that he will not execute an order brought to him by the agent first arises? Is it after the first, second, third, or after what number of orders executed? If it arises at all, it seems to me that it arises after the first order executed, and this in my judgment is not so, any more than after a second or a third order executed. As I have before stated, the defendants in this case knew nothing of the orders given to Dennis by the plaintiff after the first three which they executed, and yet it is said that, by not communicating to the plaintiff that they would not execute orders of which they knew nothing, they are liable to the customer. I cannot see this. It is said that the defendants held out Dennis as having authority to receive payments, for they took and accepted a cheque brought to them by Dennis drawn by the plaintiff in favour of Dennis. This cheque was taken in payment of an order which they had executed. If they had executed any of the orders subsequent to the first three, this might have afforded evidence of the holding out of Dennis to receive payment for the orders executed; but how does this shew that they held out Dennis to receive payment for orders which they had never heard of, and of course not executed? It seems to me that,

although there was evidence fit to be left to the jury that the defendants held out Dennis as their agent to receive orders, which they might or might not thereafter execute as they pleased, there was no evidence that he was held out by the defendants as their agent either to make contracts on their behalf, or to bind them to accept orders when brought by Dennis to them, and that they are not estopped by their conduct from asserting against the plaintiff what is the truth, namely, that they had not executed for the plaintiff the bought notes forged by Dennis. For these reasons, I have arrived at the conclusion that there is no evidence to support the second finding of the jury, and I therefore think that my brother Hawkins came to the right conclusion in entering judgment for the defendants, and that this appeal should be dismissed.

CHITTY L.J. This appeal relates exclusively to the second finding of the special jury. At the request of counsel the learned judge left three specific questions to them. The jury, having answered them, were by consent discharged, and the further consideration of the action was reserved to be heard before the judge. On the further consideration after argument he held that there was no evidence to support the finding on the second question.

It is unnecessary for me to recapitulate the facts at length. They have already been stated by the Lord Justice. The jury found that Dennis had no express authority from the defendants to bind them, and that the plaintiff did not authorize Dennis to deal with the defendants so as to bind the plaintiff by payments to Dennis, but that (in answer to the second question) the defendants did hold Dennis out, or permit him to represent himself, as possessed of authority (as I understand the finding) to bind them by acceptance of the orders given by the plaintiff to Dennis.

There was no direct evidence of holding out or permission to represent. No communications took place between the plaintiff and the defendants directly. During the transactions in question no letter passed between the plaintiff and the defendants, nor did the plaintiff visit the defendants' office, or anywhere see

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any of them. The communications which did take place were all through Dennis as an intermediary. The nature of his intervention I will state presently, when dealing with the first three transactions. He was not the bearer of any message by word of mouth from the defendants to the plaintiff. He was a young man nearly of age in March, 1895, and had for some years been a junior clerk in the employment of the defendants. He was on intimate terms with the plaintiff, a farmer, and was constantly visiting him in the country. He advised the plaintiff in Stock Exchange transactions, and the plaintiff advised him and encouraged him in betting transactions. The plaintiff, as he said in his letter to the defendants of May 31, 1896, dealt with him direct because he knew him well, and his family, and never dreamt that he was a cheat. On all orders brought by him to the defendants, and accepted by them, he was allowed a part of the commission. Such, then, stated shortly, was the general relation in which Dennis stood towards the plaintiff and the defendants.

The appellant relies on the first three transactions and the course of business followed in them; and it is contended for him that from the course of business thus followed there was evidence from which the jury had sufficient ground for drawing the inference that the defendants held forth their clerk, Dennis, as having authority to bind them to accept orders for purchase and sale on the Stock Exchange. The question narrows itself down to this: Do these transactions afford evidence from which the jury could reasonably draw the inference of fact that the defendants held Dennis out as having any such authority? These three transactions were carried out substantially in the same manner. There is no question about them except as to the inference to be drawn from them. For the purposes of my judgment it will suffice to describe the first transaction. Dennis receives from the plaintiff in the country an order by word of mouth, intended for the defendants, to buy for him certain shares on the Stock Exchange. This order is carried on February 11 by Dennis to the defendants for execution by them. Plainly the defendants on receiving the order were at liberty to reject or accept it, as they thought fit. Unless bound

by prior contract no man is bound to accept an order sent to him. A stockbroker, who accepts and executes an order to buy on the Stock Exchange, becomes bound by the Stock Exchange rules as a principal. The defendants on the order being submitted to them make inquiries of Dennis as to the position of the plaintiff, and are satisfied. But this fact does not appear to have been communicated by Dennis to the plaintiff, and has no bearing on the question of ostensible authority. The defendants, being thus satisfied, accept the order, but how? A regular Stock Exchange bought note is made out and signed by one of the principals of the defendants' firm. This note is handed by the defendants to their clerk Dennis for delivery to the plaintiff. Dennis takes the note to the plaintiff in the country and delivers it to the plaintiff. This is the only manner in which the defendants signify to the plaintiff their acceptance of his order. The plaintiff then draws a cheque on February 25 to cover this and the second transaction, and hands it to Dennis for delivery to the defendants. The cheque is delivered to them. The transaction is entered in their books and is closed.

Now, I am at a loss to see how these transactions, thus carried out, afford evidence of holding out Dennis as having authority to bind the defendants to accept any subsequent order coming from the plaintiff. The question is not whether the defendants held out Dennis as having authority merely to receive an order for transmission to them. Such a question appears to me to be beside the point. But it is whether Dennis was held out by the defendants as having authority to bind the defendants on the mere receipt of the order by him, so as to constitute the relation of principal and agents (or brokers) between the plaintiff and the defendants. I think that the evidence arising from the course followed in these transactions leads to a conclusion opposite to that contended for by the appellant. In these transactions the defendants signified their acceptance of the orders brought to them in one way and in one way only, by handing a duly signed bought note to Dennis for transmission to the plaintiff. In the subsequent transactions, which are in contest, Dennis stole or fraudulently obtained the

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defendants' forms of contract, and forged their signatures, and by these means defrauded the plaintiff. It was urged for the appellant that by the first three transactions the relation of customer and broker was constituted. Admitted that it was, so far as these transactions were concerned. But what then? The appellant's counsel contended that, having regard to this past relation, the defendants were bound to accept all further orders given by the plaintiff to Dennis, and, if not for any amount, however large, at least for moderate amounts, such as are disclosed by the first three transactions. I am unable to agree with this contention. It seems to me that, after the first three transactions, the defendants were still at liberty to reject or accept any orders received from the plaintiff by Dennis, had Dennis delivered them to the defendants. But none of them were in fact delivered, and thus the defendants had no opportunity of accepting or rejecting them. It was further urged that the defendants, by the course pursued in the first three transactions, placed the plaintiff in such a position as entitled him to presume that all orders given by him to Dennis were or would be accepted by the defendants, until they gave notice to the contrary to the plaintiff. But I cannot accept this proposition, or the proposition that authority to solicit orders was in the circumstances of this case evidence of ostensible authority to accept orders so as to bind the defendants.

In my opinion, Hawkins J. was right in holding that there was no evidence to support the second finding.

COLLINS L.J. I regret that after the most anxious consideration I am unable to agree in the conclusion arrived at by my brothers in this case. There is, however, no principle of law involved, but merely a question as to the possible inference from certain facts.

We are asked to ignore the finding of a special jury under the direction of the most experienced judge upon the bench upon a question peculiarly fitted for the decision of business men.

It is not necessary to restate the facts. That there was actual authority given by the defendants to Dennis to solicit orders on their behalf is admitted. It was proved that in three

successive transactions orders were given by the plaintiff to Dennis to be executed by the defendants' firm, and that on each occasion without any other communication between the plaintiff and the defendants, either by letter or word of mouth, contract notes for the required purchases were forwarded through Dennis to the plaintiff, and cheques returned by the plaintiff to Dennis, who handed them over to the firm. In fact each of these transactions was carried out by the defendants through the agency of Dennis. The plaintiff never saw or communicated with any one but Dennis, and the defendants communicated with the plaintiff only through Dennis. There was evidence that the plaintiff did not know the actual limitations of Dennis's authority, but looked upon him as a partner, or at all events as authorized to accept contracts on behalf of the firm. It was further proved that, on receipt of the first order, one of the partners satisfied himself by inquiries of Dennis as to the responsibility of the plaintiff before accepting him as a client. They thereupon executed the first order, and accepted payment by a cheque sent to Dennis in favour of the firm, and, the amount of the cheque sent exceeding the amount required, they repaid the difference to the plaintiff by handing to Dennis their cheque in favour of the plaintiff. They executed the next order without further inquiry, and received in payment a cheque sent to Dennis and drawn in his favour. The jury by their answer to the third question negatived the defendants' contention that Dennis was the plaintiff's agent, and that finding has not been contested.

It seems to me that these facts constituted evidence fit to be considered by a jury of a holding out by the defendants of Dennis, at the lowest, as a person authorized to receive orders on behalf of the firm. Indeed, this was hardly disputed by the defendants' counsel. If he was so held out, it would follow that the defendants would be bound to treat an order given to Dennis as received by the firm in ordinary course. They could not plead non-receipt of the order as an excuse for failure to perform it. But, as they would be in nowise bound to accept the order, I think such a mode of doing business might well ground a presumption that they undertook by some means to

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apprise the customer, whether they intended to execute it or not. The assent of the broker to the order would necessarily precede its execution, and, in dealings on the Stock Exchange, if the would-be customer had to wait to know whether his order were accepted or not till the time arrived in which notice of performance would reach him in ordinary course, he might find his purpose in the transaction wholly defeated. What mode of giving this necessary information the parties intended to adopt would be a matter of inference for a jury from all the circumstances. Where, as here, no notice of assent was given in any case before the execution of the order, I think there was evidence for the jury that the mode of doing business was that the assent, which must have preceded the execution of the order, was to be inferred from silence, in other words, that the customer would be entitled to assume in the absence of notice to the contrary that his orders were accepted in due course, and to act on such assumption by not placing them elsewhere: and thus the defendants, being estopped from denying that they received the orders, would be also estopped from denying that they accepted them. Suppose actual authority given to a particular clerk to receive orders on behalf of the firm. This would not of itself confer authority on such clerk to bind the firm to accept them; but surely, as a matter of business, it would throw upon the firm the obligation of giving notice to a customer, who had tendered an order to the person authorized to receive it, of their refusal to execute it; and, surely, in the absence of such notice, a customer, whose previous orders had been uniformly executed without notice of assent given, would be entitled to assume that the order had been accepted, and to complain if it were not performed. If a stockbroker who had executed several previous orders for a customer without any intimation that he accepted the mandate, except by forwarding the contract note, were on receiving a further order, which might be of vital importance, to decline to execute it without any notice to his customer, who, acting on the assumption that the order would be executed, abstained from placing it elsewhere, would not a jury be justified in inferring that the business was done on the implied terms that orders received

would be executed unless notice to the contrary was given, and in holding the broker responsible? I think such inference might be more readily drawn where the orders are given to an employee designated by the broker as the proper person to receive them. Business would require that the broker should consider such orders so as to determine whether he would execute them or not, and the customer would be entitled to know his decision. When the mode of doing business is that no notice of assent is given except by the execution of the contract, I think it would be unreasonable to suppose that the order could be declined without notice, and therefore the course of business might well justify the inference that, where no such notice had been given, the order had been accepted. Where there has been a long course of business, the evidence is necessarily stronger, but two or three cases may be evidence enough to justify business men in drawing an inference which indeed seems inevitable if business is to be carried on at all.

I think therefore that the facts proved constituted some evidence for the jury that the defendants by their conduct represented or permitted Dennis to represent that orders received by him would be executed by the firm unless they gave notice to the contrary. If the plaintiff changed his position on the faith of such representation, the estoppel would be complete. Though there was no express finding that the plaintiff acted on the faith of such representation, the second question seems to have been put on the assumption that he did act upon it, and no point seems to have been made that he did not; and I think there can be no doubt how the jury would have answered it, had it been left to them. We are dealing here with the finding of a special jury, who saw the witnesses, and who, or some of whom, were presumably conversant with business, and the question is not whether we should draw the same inference as they did, but whether there was evidence fit for their consideration. The evidence as to how payment was accepted by the defendants has a material bearing on the question of ostensible authority, as it is evidence both of notice to the defendants of the light in which the plaintiff regarded Dennis, and of a representation by them that

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Dennis's position in the firm was such that payment by cheque to his order was a good payment to the firm.

It is not, I think, necessary in order to support the finding of the jury to put the ostensible authority higher than I have done, but I think the facts proved were evidence of ostensible authority to accept as well as to receive orders within limits measured by reference to the business actually accepted. Had the learned judge entered judgment for the plaintiff, I cannot help thinking that counsel would have had an uphill task in seeking to set it aside in this court on the ground that there was no evidence to support the verdict.

The result is that I think Hawkins J. was right in leaving the question to the jury, but wrong in holding that there was no evidence to support the finding. If the finding stands, the plaintiff would be entitled to judgment for at least nominal damages under the second alternative in paragraph 5 of the claim. This falls very far short of the whole relief claimed by the plaintiff, and I agree with Hawkins J. and my brothers of this Court that the defendants are not bound by the forgeries of Dennis, nor estopped from denying that they executed the orders received by him. The question whether he was held out as authorized to receive payment on their behalf was not left to the jury, but I think there is evidence that Dennis was held out as authorized to receive payment, even by cheques payable to his own order. Although in the undisputed cases the cheques were sent in return for contracts, I think the representation arising from the defendants' conduct in allowing such modes of payment to pass without comment might be construed by the jury to cover an authority to receive cheques along with the orders.

I feel constrained therefore to hold that the finding of the jury on the second question must stand, and that the plaintiff is entitled to judgment on this appeal.

*Appeal dismissed.*

Solicitors for plaintiff: *Emanuel, Round & Nathan.*
Solicitors for defendants: *Debenham & Walker.*

E. L.

[IN THE COURT OF APPEAL.]

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*Feb.* 3.

## *Ex parte* WICKENS.

*Bill of Sale—Last Receipt for Rent—Reasonable Excuse for Non-production—Rent Due but not demanded by Landlord—Demand to send Receipt to Grantee by Post—Goods Seized to Realize Security—Relief against Seizure—Jurisdiction to "make such Order as may seem just"—Order as to giving up Bill of Sale—Costs of Levy—Costs of Application—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 7.

The grantee of a bill of sale gave the grantor notice in writing to send by post the last quarter's receipt for rent. The rent had not been paid, the landlord not having demanded it. No receipt having been sent, the grantee seized, and claimed the sum advanced, the whole of the interest secured by the bill of sale, and the costs of the levy. The grantor applied for relief under s. 7 of the Bills of Sale Act, 1882, and the judge at chambers ordered that the grantee should withdraw and give up the bill of sale upon the grantor paying the principal sum with interest to date, but without the costs of the levy, and ordered the grantee to pay the costs of the application. On appeal:—

*Held*, that the grantor had not "without reasonable excuse" failed to produce his last receipt for rent, within the meaning of s. 7, sub-s. 4, of the Bills of Sale Act, 1882.

*Ex parte Cotton*, (1883) 11 Q. B. D. 301, approved.

*Held* also, by Chitty and Collins L.JJ., that a demand that the last receipt shall be sent to the grantee by post is not a demand to produce the receipt to him within the meaning of s. 7, sub-s. 4, of the Act:

*Held*, also, that, as the grantee had seized for the purpose of realizing his security, the judge had jurisdiction to order him to withdraw and give up the bill of sale on payment of the principal with interest to date, and, as the seizure was wrongful, to refuse to give him the costs of the levy, and to order him to pay the costs of the application.

APPEAL from an order of a judge at chambers.

On July 14, 1897, Emilyn Wickens gave a bill of sale over the furniture in her house at Weston-super-Mare, where she resided, to one Shuckburgh, who carried on business at Bristol as the Clerical and Medical Advance Bank, to secure the repayment of an advance of 30*l.* and interest thereon at the rate of 60*l.* per cent. per annum; and the grantor covenanted to pay to the grantee the principal sum and the interest as follows: 1*l.* 10*s.* on August 14, 1897, and 1*l.* 10*s.* on the 14th of each succeeding

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month until July 14, 1898, when she would pay the sums of 30*l.* and 1*l.* 10*s.* The bill of sale contained a proviso that the chattels thereby assigned should not be liable to seizure or to be taken possession of by the grantee for any cause other than those specified in s. 7 of the Bills of Sale Act, 1882. In the answers to questions put to her when applying for the advance, the grantor stated that 9*l.* was due for one quarter's rent, and that the advance was required for the purpose of, amongst others, paying the rent. On July 19 the grantee wrote to the grantor asking her to send to him in course of post the June quarter's receipt for rent, and on July 22 he sent to her by post from Bristol a formal demand in writing for the receipt for rent, stating that the "same must be received here on or before Monday next the 26th inst." This requirement not having been complied with, the grantee on July 27 by his bailiff seized and took possession of the furniture included in the bill of sale, the warrant authorizing the bailiff to seize and hold possession being made out for 48*l.* principal and interest, and 4*l.* 18*s.* costs of levy. Prior to taking possession the bailiff demanded this sum, and informed the grantor that unless it was paid he was instructed to seize. At this time the grantor had not paid the June quarter's rent, the landlord not having made any demand for it. Subsequently, on the same day, the grantor paid the quarter's rent, and the grantor's solicitor tendered to the bailiff the sum of 35*l.* 13*s.*, being 30*l.* for principal, 15*s.* for interest from July 14 to July 27, and 4*l.* 18*s.* costs of levy, and shewed him the receipt for rent. The bailiff refused to accept the amount tendered or to withdraw from possession until the full amount of 52*l.* 18*s.* was paid. On July 28 a summons was taken out at chambers on behalf of the grantor for an order under s. 7 of the Bills of Sale Act, 1882, to restrain the grantee from removing or selling the chattels included in the bill of sale, and that upon payment of the principal sum of 30*l.*, together with interest thereon at 60 per cent. per annum until payment, and the costs of the levy, the grantee should be ordered to withdraw from possession, and that the bill of sale should be discharged. Day J. ordered the grantee to withdraw from possession, and that the bill of sale should be given up to

the grantor, she paying to the grantee 30*l.* for principal and 15*s.* for interest; and he also ordered the grantee to pay the costs of the application.

The grantee appealed.

*Lewis Thomas* (*H. Reed, Q.C.*, with him), for the grantee. The grantee was entitled to take possession under s. 7, sub-s. 4, of the Bills of Sale Act, 1882, by reason of the non-production of the last receipt for rent—that is, the receipt for the last quarter's rent. The seizure was therefore lawful. The grantee took possession for the purpose of protecting the goods against any possible distress by the landlord, and not for the purpose of realizing his security. It is admitted that if a mortgagee takes steps to enforce payment of his debt he is not entitled to six months' interest in lieu of notice, but may be paid off at once with interest up to date and costs. It is doubtful whether that rule would apply to a bill of sale; but even if it does apply it must be shewn that the grantee has seized the goods for the purpose of realizing his security, and the Court might, in such a case, upon a proper application, order the bill of sale to be given up on payment of principal, interest to date, and costs. The judge however, in acting under s. 7, was exercising a statutory jurisdiction, and his powers were limited by the statute, and he could not order the grantee to accept the principal sum and interest to date and to give up the bill of sale. Nor had the judge jurisdiction to order the grantee to pay the costs of the application at chambers and to refuse to order the grantor to pay the costs of the levy. The seizure was rightful, and the grantor was asking for relief and an indulgence under the statute. *Ex parte Cotton* (1) is relied upon by the grantor to shew that the seizure was wrongful upon the ground that, though the grantor had not paid the rent, yet, as the landlord had not demanded it, there was no failure without reasonable excuse to produce the receipt. In the present case the grantor obtained the advance for the express purpose of paying the rent, and therefore there was an absence of reasonable excuse for non-production of the receipt. If, however,

(1) 11 Q. B. D. 301.

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that case does apply, it ought not to be followed. Even assuming that the seizure was wrongful, the judge had only jurisdiction to order the grantee to withdraw and pay the costs. The order was therefore wrong. [He also referred to *Calvert* v. *Thomas.* (1)]

*Danckwerts*, for the grantor. Assuming that the seizure was rightful, the facts prove that the grantee when he took possession was endeavouring to realize his security, and not merely to protect it. The warrant shews that he was claiming the principal sum and interest up to July 14, 1898, and when the bailiff took possession he refused to withdraw unless that sum and costs were paid. The decisions in Chancery, of which the last is *Bovill* v. *Endle* (2), shew that where a mortgagee takes steps to realize his debt the mortgagor may pay him the principal sum with interest to date and costs, and need not pay him six months' interest in lieu of notice. The principle of those cases governs the present. The judge has jurisdiction under s. 7 of the Bills of Sale Act, 1882, to make an order to that effect, the words "or may make such other order as may seem just" being sufficient to give the power. A similar order under the interpleader rules was upheld in *Forster* v. *Clowser.* (3) Day J. therefore had jurisdiction to order the principal and interest to date to be paid off and the bill of sale to be given up. Secondly, the seizure was wrongful. There was no proper demand in writing for the production of the last receipt for rent. The only demand was to send the receipt by post to the grantee at Bristol. The grantee cannot call upon the grantor to part with the receipt. The place to produce the receipt is the place where the grantor is. If the grantee left England he could not call upon the grantor to post the receipt to him abroad. Nor was there any failure without reasonable excuse to produce the last receipt for rent. The "last receipt for rent" means the last receipt for rent paid. Here the receipt for the June quarter's rent was demanded. The rent had not been paid, nor had the landlord demanded it, and it was held in *Ex parte Cotton* (4) that in these circum-

(1) (1887) 19 Q. B. D. 204.
(2) [1896] 1 Ch. 648.
(3) [1897] 2 Q. B. 362.
(4) 11 Q. B. D. 301.

stances there was not a failure without reasonable excuse to produce the receipt. The seizure being wrongful, the learned judge had jurisdiction to refuse to order the grantor to pay the costs of the levy and to make the grantee pay the costs of the application at chambers.

*Lewis Thomas*, in reply. In *Bovill* v. *Endle* (1) and the cases preceding it, there was a voluntary act on the part of the mortgagee for the enforcement of the security. Here the grantee was compelled to take possession in order to protect his goods from seizure by the landlord.

A. L. SMITH L.J. In my opinion the order of Day J. is right, and this appeal fails. The controversy in this case arises under a bill of sale executed on July 14, 1897, and given to secure the repayment of the sum of 30*l.* advanced and interest at the rate of 60 per cent. per annum, the interest being payable by instalments of 30*s.* on the 14th of each month, the first of which would become due upon August 14, 1897, the principal sum of 30*l.* and the last instalment of interest being payable upon July 14, 1898. A few days after the execution of the bill of sale the grantee made a demand in writing for the production by the grantor of the last quarter's receipt for rent. That demand was not complied with, because the rent in question had not been paid at that time, though it was due, the landlord not having demanded or pressed for it. Upon July 27 the grantee took possession by his bailiff and seized the goods. The warrant under which the bailiff entered and seized contained a demand upon the grantor for payment of 52*l.* 18*s.*, covering principal and interest for a year, when at that date nothing was due for principal, nor was the first monthly instalment for interest due. The most that could be said to be due upon any view of the matter was 15*s.* for interest for half a month. In these circumstances it seems to me to be clear that the grantee took possession for the purpose of realizing his security, and not for the purpose of protecting the goods and maintaining his security. Thereupon the grantor took out a

(1) [1896] 1 Ch. 648.

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A. L. Smith L.J.

summons under s. 7 of the Bills of Sale Act, 1882, which enacts, in the proviso, that the grantor may within five days from the seizure apply to the High Court or to a judge thereof in chambers, and such Court or judge, if satisfied that by payment of money or otherwise the cause of seizure no longer exists, may restrain the grantee from removing or selling the chattels, or may make such other order as may seem just. Day J. made an order under that section that upon payment to the bill of sale holder of 30*l.* for principal and 15*s.* for interest up to date, the bill of sale should be discharged. It is said that the learned judge upon that application had no power to order the bill of sale to be discharged. It has been pointed out that where a mortgagee has entered into possession or taken other steps for the purpose of realizing his security, the Court has jurisdiction, upon payment of the debt, the interest then due, and the costs, to order the security to be given up. The last of a series of cases upon the subject is that of *Bovill* v. *Endle*. (1) In my opinion the grantee under a bill of sale is in a similar position. The facts in the present case shew that the grantee took possession for the purpose of realizing his security, and accordingly Day J. had jurisdiction to order that the bill of sale should be discharged upon payment of the principal sum and interest up to date. It is contended, however, that the learned judge ought to have allowed the costs of the levy. That depends upon whether the seizure was rightful or not. In my opinion it has not been shewn that the seizure was rightful. The grantor had not paid the rent, and the landlord had not demanded it, and there was not, therefore, a failure without reasonable excuse to produce the last receipt for rent. This view is in accordance with the judgment which I delivered upon this point many years ago in the case of *Ex parte Cotton* (2), and I still think that decision is right. The learned judge, therefore, had jurisdiction to disallow the levy fee. There remains the question whether the learned judge had jurisdiction to order the grantee to pay the costs of the application. It seems to me that in the circumstances of this case the learned judge had

(1) [1896] 1 Ch. 648.

(2) 11 Q. B. D. 301.

jurisdiction to make that order; and indeed I should have made the same order had I been in his place. In my opinion, therefore, this appeal fails.

CHITTY L.J. I agree. The grantee of a bill of sale has no right to seize or take possession of chattels assigned under a bill of sale, except for one of the causes specified in s. 7 of the Bills of Sale Act, 1882. The cause relied upon as affording ground for seizure in this case is that specified in sub-s. 4 of that section, namely, that the grantor has not, without reasonable excuse, upon demand in writing by the grantee, produced to him his last receipt for rent. In the present case one of the purposes for which the loan was made was to pay the rent, and the answers of the grantor, when applying for the loan, shew that the rent was paid up to March 25, 1897. Now, in the first place, the demand by the bill of sale holder for the June quarter's receipt for rent was not a demand for the mere production of the receipt, but a demand that the receipt should be sent by post to Bristol. In the next place, the landlord had not demanded the rent, and a short time had elapsed since it fell due. In my opinion, upon the facts of this case, it would be wrong to hold that the grantor had failed without reasonable excuse to produce the receipt. I think that the judgment of the Divisional Court in *Ex parte Cotton* (1) was founded on good sense, and I accept it as applicable to this case. The bill of sale holder put his bailiff in possession on July 27, and the bailiff, at the time when he took possession, demanded payment of 52*l.* 18*s.*, a sum which included the principal sum advanced and all interest down to July 14, 1898. The grantor then applied for relief to the judge at chambers. It may be a question whether, upon a demand for production of the last receipt for rent and upon failure without reasonable excuse to comply with that demand, and an entry into possession in consequence, the grantee may not maintain that he entered for the purpose of protecting his security. But I have no hesitation in saying that the seizure in this case was for the purpose of realizing the security—in other words, for the purpose of

(1) 11 Q. B. D. 301.

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enforcing payment. It is clear beyond doubt in equity that if a mortgagee takes proceedings to enforce his security the mortgagor can at once tender the principal, interest, and costs, and is absolved from the obligation of giving six months' notice to pay off the mortgage, or of paying six months' interest in lieu of notice. The reason is that the mortgagee is enforcing his security. Here the facts proved before the judge at chambers shewed that the bill of sale holder was enforcing his security. That raises the question as to the jurisdiction of the judge to make the order before us. He might, no doubt, have made a less stringent order if he had thought fit to do so. In my opinion the concluding words of s. 7, "or may make such other order as may seem just," gave the judge jurisdiction to make this order. The bill of sale holder was seeking to enforce his security, and the judge had jurisdiction to say that it was just to order the security to be discharged upon payment of the principal sum and interest up to date. The other terms of the order also seem to me to be just. For these reasons I think that this appeal should be dismissed.

COLLINS L.J. I am of the same opinion. When it once becomes apparent that the bill of sale holder was proceeding to realize his security, that lets in the jurisdiction of the judge to compel him to accept the principal sum and interest then due. It was admitted on behalf of the appellant that the cases in equity were to that effect as between mortgagor and mortgagee, and I cannot distinguish the case of a mortgagee from that of a bill of sale holder. The only question then is whether the bill of sale holder seized for the purpose of realizing his security. There is no conflict of evidence upon this point. First there is the warrant which contained a demand for payment of 52*l.* 18*s.*, covering the principal sum and interest for a year. Then we have the evidence that the bailiff told the grantor that he would remain in possession until the full amount named in the warrant had been paid. It is true that the cause which, it was alleged, let in the right to take possession was the non-production, under s. 7, sub-s. 4, of the Bills of Sale Act, 1882, of the last receipt for rent. That was

the excuse for entering; but the entry was in fact made for the purpose of realizing the security, and that let in the jurisdiction of the judge to order that the bill of sale should be discharged upon payment of the debt and interest up to that date. Then comes the question as to the jurisdiction of the judge to refuse to order the grantor of the bill of sale to pay the levy fee and to order the bill of sale holder to pay the costs of the application for relief. That depends upon whether the seizure was rightful or wrongful. The burden of shewing that the seizure was rightful lies on the bill of sale holder. The cause of entry here was the non-production of the last receipt for rent. The bill of sale holder has to shew that the grantor did not, without reasonable excuse, upon demand in writing produce the receipt. In the first place, he does not shew that the grantor failed "without reasonable excuse" to produce the receipt, inasmuch as the landlord had not made any demand for the rent. For that proposition it is sufficient to cite the case of *Ex parte Cotton* (1), a decision with which I agree. In the next place, even if the grantor had paid the rent, I do not think that she was bound to part with the evidence that she had done so. The only demand made upon the grantor was to send the receipt to the bill of sale holder by post to Bristol. That demand required her to part with the receipt, and in my opinion her failure to send it to the bill of sale holder by post was not a failure to produce the receipt within the meaning of s. 7, sub-s. 4, of the Bills of Sale Act, 1882. Upon both grounds I think that the entry was wrongful, and the judge had, therefore, jurisdiction to order the bill of sale holder to pay the costs and to refuse to order the grantor to pay the levy fee.

*Appeal dismissed.*

Solicitors for grantee: *Ford & Ford, for J. Cumberland, Bristol.*

Solicitors for grantor: *Pritchard, Englefield & Co., for A. R. Ford, Weston-super-Mare.*

(1) 11 Q. B. D. 301.

A. M.

1898
*March 2.*

## THE QUEEN *v.* STEWART.

*Local Government—Election of County Council—Practice—Death of Candidate between Nomination and Poll—Duty of Returning Officer to countermand Poll—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 58—*Ballot Act*, 1872 (35 & 36 *Vict. c.* 33), *s.* 1.

Where, at a contested election for a county council, a candidate dies between the nomination and the poll, it is the duty of the returning officer for the division in which he was a candidate to countermand notice of the poll.

APPLICATION for a prerogative writ of mandamus to the returning officer for the Central Hackney Division of the administrative county of London to countermand notice of the poll for the election of county councillors for that division.

The date of the election of the county council for the administrative county of London was duly fixed by the county council under 54 & 55 Vict. c. 68, for March 3. On February 23, which was the day for receiving nominations, four candidates were nominated for the Central Hackney Division of the county, namely, Henry Sylvester Samuel, James Stuart, Thomas McKinnon Wood, and Thomas Bentley Westacott. On February 26 Mr. Samuel died, and notice of his death was received by the returning officer on March 1.

This application was now made on behalf of Mr. Westacott.

*Dickens, Q.C.* (*S. H. Day* with him), for the applicant. By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 2, the election of county councillors shall be conducted in the same manner as the election of the council of a borough, and the provisions in that behalf of the Municipal Corporations Act, 1882, shall apply. (1) By s. 58 of that Act, in case of a contested

(1) By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 58, "If an election of councillors is contested the poll shall as far as circumstances admit, be conducted as the poll at a contested parliamentary election is, by the Ballot Act, 1872, directed to be conducted, and subject to the modifications expressed in Part III. of the Third Schedule and to the other provisions of this Act, the provisions of the Ballot Act, 1872, relating to a

election, the poll shall be conducted in the same manner as a contested parliamentary election under the Ballot Act, 1872, and the provisions of that Act relating to a poll are made to apply. Then by s. 1 of the Ballot Act, where a candidate dies between the nomination and the commencement of the poll, the returning officer must countermand the poll, and the proceedings must commence de novo from the time when proof of the death is given to the returning officer.

[He was stopped.]

*Macmorran, Q.C.* (*Avory* with him), for the returning officer. Sect. 1 of the Ballot Act is not incorporated by s. 58 of the Municipal Corporations Act, 1882. It relates solely to nomination of candidates, as is shewn by the marginal note, and is not a provision "relating to a poll" within the meaning of s. 58. It is entirely inapplicable, as the proceedings in relation to the nomination of candidates for Parliament cannot be made to apply to an election of county councillors. In the election of county councillors the date of the poll is fixed by the county council itself, and not by the returning officer; there is no writ, and the returning officer has no power to "adjourn the election" for the purpose of taking a poll. If the applicant is successful, and the returning officer is ordered to countermand

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poll at a parliamentary election .... shall apply to a poll at an election of councillors."

By the Ballot Act, 1872 (35 & 36 Vict. c. 33), s. 1, "A candidate for election to serve in Parliament for a county or borough shall be nominated in writing .... If at the expiration of one hour after the time appointed for the election no more candidates stand nominated than there are vacancies to be filled up the returning officer shall forthwith declare the candidates who may stand nominated to be elected .... but if at the expiration of such hour more candidates stand nominated than there are vacancies to be filled up the returning officer shall adjourn the election and shall take a poll in manner in this Act mentioned. .... If after the adjournment of an election by the returning officer for the purpose of taking a poll one of the candidates nominated shall die before the poll has commenced the returning officer shall upon being satisfied of the fact of such death countermand notice of the poll, and all the proceedings with reference to the election shall be commenced afresh in all respects as if the writ had been received by the returning officer on the day on which proof was given to him of such death, provided that no fresh nomination shall be necessary in the case of a candidate who stood nominated at the time of the countermand of the poll."

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the poll, there is no power to fix a day for the poll until the new county council comes into existence.

The object of this provision in the Ballot Act was to prevent either representative of the two great parties in the realm from snatching an advantage through the death of an opponent between nomination and poll. But in a county council election there may be many candidates holding different views, and the death of one would not of necessity give any party an advantage. Again, it is doubtful whether the Court has any power to order the poll to be countermanded in one division of the county. It has been decided that an elector can only vote in one division of the county (1); but if the election for Central Hackney is not held on March 3, but on some subsequent day, there is nothing to prevent persons who possess a double qualification, and who have already voted on March 3 for some other division, from voting in the election for Central Hackney. The electorate, therefore, will not be the same as if the election were held on March 3. The countermanding of a poll is not a provision relating to the conduct of a poll.

*Dickens, Q.C.*, in reply. By s. 58 of the Municipal Corporations Act, 1882, the poll is to be conducted "as far as circumstances admit" in the same manner as provided by the Ballot Act. The section of the Ballot Act must, therefore, be adapted to the requirements of a county council election.

GRANTHAM J. We both think that the best view to take of this matter, which is certainly one of some difficulty, is to hold that s. 58 of the Municipal Corporations Act, 1882, incorporates the last part of s. 1 of the Ballot Act. I feel no difficulty in holding that the countermanding of the poll is a provision relating to the poll.

It would be very inconvenient, I think, that the names of four candidates should be submitted to the electors on the ballot-papers when one of those candidates was dead. It was contended on the other side that the Ballot Act contemplated the existence at each election of two candidates respectively representing the two great political parties, and that it would,

(1) See *Knill* v. *Towse*, (1890) 24 Q. B. D. 697.

in the opinion of the Legislature, be unfair to allow either of these to snatch a victory in consequence of the death of his opponent between nomination and poll. But I am not much impressed by that argument, because it seems to me that whenever there is an election the probability is that there will be a contest, and candidates will come before the constituency representing different views, and it would be just as unfair to allow one of them to snatch a victory as to allow a parliamentary candidate to do so.

But the argument which at first I found it difficult to get over was that propounded by Mr. Macmorran as to the difficulties that would ensue from applying this provision of the Ballot Act to the election of a county council. I think, however, that these difficulties can be overcome. As has been pointed out, the poll shall be conducted, by s. 58, in the manner provided by the Ballot Act, "as far as circumstances admit," and I think that under s. 70 we have power to fix a day for the holding of the election if application be made to us in that behalf. In my opinion, a peremptory writ must issue to the returning officer directing him to countermand the day fixed for the poll.

WRIGHT J. The first question is as to the form of this application. It seems to me that the proper and best remedy in this case is that by prerogative writ of mandamus, and there is certainly no other remedy equally convenient.

I think it is to be noted that s. 58 does not merely enact that the provisions of the Ballot Act relating to a poll at a parliamentary election shall apply, but it provides that the poll shall as far as circumstances admit be conducted as the poll at a parliamentary contested election is by the Ballot Act directed to be conducted. I agree that the countermanding of the notice of the poll is no part of the nomination, but is either part of the proceedings relating to the taking of the poll, or something intermediate between nomination and poll. That being so, we are bound by s. 58 to hold that the provisions of the last clause of s. 1 of the Ballot Act apply if it is possible that they can do so. I admit that I was much impressed by

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Wright J.

the argument of Mr. Macmorran as to the difficulties that would ensue; but I think that the words "as far as circumstances admit" enable us to construe "the day on which the writ had been received by the returning officer" in the Ballot Act as being equivalent to the day on which notice of the election had been given to the returning officer in the county council election. I agree, therefore, that the mandamus must go.

*Application granted.* (1)

Solicitors for applicant: *Grover, Humphreys & Son.*
Solicitor for respondent: *W. A. Blaxland.*

A. P. P. K.

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1898
*March* 5.

[COURT FOR CROWN CASES RESERVED.]

## THE QUEEN *v.* CLEMENS AND OTHERS.

*Criminal Law—Malicious Damage to Property—Assertion of Right—Using more Force than Necessary—Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 51.

On the trial of an indictment for malicious damage to property under 24 & 25 Vict. c. 97, s. 51, where the defence set up is a claim of right, the proper direction to the jury is: Did the defendants do what they did in the exercise of a supposed right? adding that if, on the facts before them, the jury come to the conclusion that the defendants did more damage than they could reasonably suppose to be necessary for the assertion or protection of that right, then the jury may properly and ought to find the defendants guilty of malicious damage under s. 51.

SPECIAL CASE stated by the chairman of the quarter sessions for the county of Cornwall.

In August, 1897, a limited company, having obtained a lease of certain land at Newquay in Cornwall, began to excavate the foundations of a hotel upon it, and erected upon it a wooden building as an office. On August 31 a large number of persons, among whom were the defendants, assembled at Newquay and

(1) Subsequently the Court, on the application of the returning officer, and with the assent of the candidates, made an order, under s. 70 of the Municipal Corporations Act, 1882, fixing March 14 as the date of the poll.

proceeded to the place in question. They there fastened a rope to the wooden building, pulled it over, and broke it up. They then tied the rope to two sides of the wooden building, dragged them to the edge of the cliff, and threw them into the sea, which is 120 yards distant from the place where the wooden building had been erected. They then returned, tied the rope to the remaining two sides of the wooden building, dragged them to the cliff, and likewise threw them into the sea. The wooden building was thereby completely destroyed. They were indicted at quarter sessions under s. 51 of 24 & 25 Vict. c. 97, for malicious damage to the wooden building.

For the defence, evidence was given that until about sixty years ago the land in question was part of a common on which the inhabitants of Newquay were accustomed to mend and dry their nets, and to take sand from and to cut the rushes growing thereon, and to go upon it for the purposes of recreation and of access to the sea; and that about sixty years ago the owner of the soil inclosed this part of the land, but, by agreement with the inhabitants of Newquay, put a stile in the hedge of such inclosure for the purpose of giving access to the land; and the inhabitants and visitors to Newquay have been accustomed to use the stile and to wander at pleasure over such inclosed land.

It was contended for the defendants that they were not guilty on the ground that the acts done by them had been done bonâ fide in the assertion of rights over the land which they believed to be possessed by the inhabitants of Newquay.

The chairman directed the jury that if they found that the defendants acted in the exercise of what they believed to be a right to remove an obstruction, but did more than was necessary for removing an obstruction, or greater damage than they were bound to do for that purpose, they ought to find the defendants guilty.

The jury found the defendants guilty with extenuating circumstances, which, at the request of the defendants' advocate, they explained as meaning that they found that they acted in the belief that they were asserting a right in the first place, but that by destroying the wooden building and

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throwing it over the cliff they did more than was necessary to be done in asserting that right.

A copy of the summing-up of the chairman was annexed to and formed part of the case.

*H. E. Duke*, for the defendants. The chairman was wrong in directing the jury that if they found that the defendants had committed excessive damage in the assertion of a supposed legal right the excuse afforded by that supposed right was taken away: *Perry* v. *Fitzhowe*. (1) No doubt the conduct of the defendants was evidence that they acted maliciously; but if they acted, as the jury found, in the assertion of a supposed right, the fact that they did more than was necessary to assert that right is immaterial.

*Bucknill, Q.C.*, and *W. T. Lawrance*, for the prosecution, were not called upon to argue.

LORD RUSSELL of KILLOWEN C.J. In this case the Court is called upon to express its judgment on a special case stated by the chairman of quarter sessions for the county of Cornwall as to the conviction of certain persons who were convicted, under s. 51 of 24 & 25 Vict. c. 97, of malicious damage to property.

The facts of the case are not very clearly stated, but possibly that is due to the manner in which the case was presented at the trial.

It seems that there was at Newquay, in Cornwall, a meadow the right to the soil of which is not in question, but over which certain rights were claimed by the public. On the whole I gather that there was no evidence before the court of quarter sessions of the probable existence of any of these suggested rights except the right of access to the sea and of using the land for the purposes of recreation.

We are not expressly told who the defendants are, and whether they claim these rights as inhabitants or as occupiers of particular tenements. On the whole, however, I think that we are justified in assuming that they were inhabitants of the

(1) (1846) 8 Q. B. 757.

town of Newquay, and that they claimed such rights as they did claim in that capacity. It appears that on the meadow in question a wooden structure had been erected which was ancillary to a contemplated building. The defendants, as is found by the jury, went upon the land in assertion of what they believed to be their rights; but what they did was to absolutely demolish this structure, and deliberately to haul first one part of it and then the remainder to the edge of the cliff, and to throw those parts into the sea, thereby destroying it. It is not and it cannot be denied that on that state of facts there was evidence on which the jury might have found the defendants guilty of unlawfully and maliciously committing damage, injury, and spoil within the meaning of s. 51; but it is contended that the chairman misdirected the jury, and that, therefore, this conviction cannot stand. It seems to me that the proper direction to give to a jury in such a case is that they should ask themselves this question: Did the defendants do what they did in the exercise of a supposed right? adding that if, on the facts before them, the jury come to the conclusion that the defendants did more damage than they could reasonably suppose to be necessary for the assertion or protection of that right, then the jury may properly and ought to find the defendants guilty of malicious damage under s. 51. That is, as it seems to me, in substance and effect what the jury were told by the chairman in this case. Very possibly there may be some phrases in his summing-up which do not quite accord with this view, but on the whole I think that his charge conveyed to the jury with sufficient precision the points that it was necessary for them to consider before arriving at their verdict; and, therefore, that this conviction must be affirmed.

GRANTHAM, WRIGHT, BIGHAM and DARLING JJ. concurred.

*Conviction affirmed.*

Solicitors for Crown: *Graham & Graham, Fowey.*
Solicitors for prisoners: *Carthew & Wheeler.*

A. P. P. K.

1898
*Feb.* 12;
*March* 4.

## THE QUEEN *v.* DOUGLAS AND OTHERS.

*Justices—Disqualification—Incompatible Offices—Clerk to Justices.*

The position of clerk to justices is incompatible with that of justice of the peace; and therefore where a person who held the office of clerk to justices was elected to another office which carried with it the position of justice of the peace, his acceptance of the latter office vacated that of clerk to the justices.

RULE NISI for a certiorari to bring up and quash a conviction.

On August 30, 1897, a man named Walker was convicted of assault by a court of summary jurisdiction sitting at Christchurch, in the county of Southampton. The bench consisted of six justices of the peace for the county, one of whom was Alderman James Druitt, the Mayor of Christchurch. It appeared that Mr. Druitt was admitted a solicitor in 1838, and continued to practise at Christchurch till 1892. In 1838 he was appointed clerk to the justices of the Christchurch division of the county of Southampton, and discharged the duties of that office until May, 1896, but subsequently, in consequence of age and infirmity, the duties of the office were discharged for him by his son. He had more than once tendered his resignation of the office to the justices, but it had not been accepted, and he continued to draw the salary of the office down to January 10, 1898. In 1892 he transferred his business as a solicitor to his son and nephew, and had not practised since. He had, however, continued to take out a certificate until 1896, believing that it was necessary for him to do so as registrar of the county court. He did not take out a certificate for 1897. On November 9, 1896, he was duly elected mayor of the borough of Christchurch, and as such, by virtue of ss. 21 and 22 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), became a justice of the peace for the county of Southampton, and took the oaths and acted as such justice accordingly.

The rule was obtained on the ground that Mr. Druitt was on August 30, 1897, disqualified from acting as a justice of the

peace, both because he was clerk to the justices, and also because he was a practising solicitor.

*A. T. Lawrence, Q.C.* (*Clavell Salter* with him), shewed cause against the rule. A person who holds the office of clerk to justices is not disqualified from acting as a justice, and the mere fact that he adjudicated on the case is not sufficient to make the conviction bad.

[WRIGHT J. Are not the positions of justice of the peace and clerk to the justices absolutely incompatible?]

If so, by accepting the office of mayor this gentleman vacated the incompatible office of clerk to the justices: *Rex* v. *Patteson.* (1)

He had ceased to practise as a solicitor in 1892, and there is, therefore, nothing in that point.

*Ernest Bowen Rowlands* (*F. H. M. Corbet* with him), in support of the rule. When Mr. Druitt was elected mayor, and thus became a justice of the peace, his certificate for 1896 was still in force, and he was therefore incapable, as a practising solicitor, of being a justice. The offices of clerk to the justices and justice being incompatible, the question is which of them is vacated. A clerk to justices cannot vacate his office without the leave of his employers, and therefore if either office is vacated it is that of justice of the peace. *Rex* v. *Patteson* (1) is explained in *Worth* v. *Newton.* (2)

*Cur. adv. vult.*

March 4. The judgment of the Court (Lord Russell of Killowen C.J. and Wright J.) was delivered by

LORD RUSSELL of KILLOWEN C.J. In this case a rule was obtained for a certiorari to bring up and quash a conviction for assault. The conviction took place at Christchurch, in the county of Southampton, on August 20, 1897, before a bench of six county magistrates. It was alleged that the conviction was wrong because one of those magistrates was disqualified from adjudicating, and the case forms a good illustration of

(1) (1832) 4 B. & Ad. 9. (2) (1854) 23 L. J. (Ex.) 338.

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the strict requirements of the law in such matters, since if that magistrate were disqualified the conviction would undoubtedly be bad, although the remaining five magistrates were fully qualified. The magistrate in question, Alderman Druitt, had been elected Mayor of Christchurch, and by virtue of the provisions of the Local Government Act, 1894, he, while holding that office, became a justice of the peace for the county. Two objections have been taken to his being qualified to act as a magistrate—the first, that he was at the time a practising solicitor; the other, that he was the clerk to the justices; and it is contended that on both those grounds he was incapacitated from acting as a magistrate. As to the first objection, we have come to the conclusion on the facts that it cannot be sustained. It is clear that he had ceased to practise as a solicitor in 1892, and although up to 1896 he had been in the habit of taking out his certificate, he had only done so because he believed it was necessary for him to do so in his position as registrar of the county court, and not for the purpose of practising as a solicitor. That objection, therefore, fails.

But the main objection was that, being the clerk to the magistrates, he was incapable of acting as a magistrate, and and this is the more serious question in the case. It appears that he was elected to the office of clerk to the justices as long ago as 1838, and that he continued to hold the office as far as drawing the salary of it, and, being liable to be called upon to advise the magistrates, went, down to a date subsequent to this conviction. It is true that he had tendered his resignation of the office to the magistrates; but they had, as it seems to me most improperly, not accepted it, but had permitted him to continue to hold the office and draw the salary of it. I do not think that either the magistrates or this gentleman intended to act wrongly; but, as I have said, their conduct seems to me reprehensible.

Although he held the office and drew the salary, it is however clear that he did not in fact perform the duties of the office, but was allowed by the magistrates to have those duties performed for him by his son. The questions that we have to decide are, whether he was in fact incapacitated as holding the office

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of magistrates' clerk from acting as a magistrate, and what in point of law is the effect of a magistrates' clerk accepting a position which in effect makes him a magistrate. It is obvious that a magistrates' clerk is the servant of the magistrates. He is appointed by them and his salary is fixed by them. He cannot, however, be compelled to continue to hold the office of magistrates' clerk against his will. He is at liberty if he chooses to decline to continue in office, and the magistrates have no power to refuse to receive his resignation. He might, therefore, have freed himself from the office if he had chosen to do so.

It is clear also that the offices of magistrate and clerk to the magistrates are incompatible; and the question is what under the circumstances is the effect of a man holding two incompatible offices. We think that the principle deciding this case is the principle laid down in *Reg.* v. *Corporation of Bangor* (1) by the Court of Appeal.

In that case a person who was an alderman of a borough was elected a councillor for the same borough, and it was held that by accepting the latter office he vacated the former. Lord Esher M.R. said (2): "A long series of authorities has upheld the proposition that when two offices are incompatible, and the suggested ineligibility of the candidate for one of them only arises from the fact that it is incompatible with the office he already holds, he is not thereby prevented from being elected to the second office, whether it be superior in rank or power to the other or not. The cases have decided that if a person holding one office be elected to another, and accepts that election, he thereby vacates the office he held, and thus the difficulty with respect to the impossibility of holding two incompatible offices is got rid of."

That principle applies here; and we therefore think that by accepting the office of mayor, which carried with it the position of magistrate for the county, this gentleman vacated the office of clerk to the magistrates. That being so, he was not disqualified from acting as a magistrate at the time of this

(1) (1886) 18 Q. B. D. 349.

(2) 18 Q. B. D. at p. 361.

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conviction; and the rule for a certiorari must, therefore, be discharged, but, under the circumstances, without costs.

*Rule discharged.*

Solicitors for applicant: *Routh, Stacey & Co., for Burt & Haviland, Christchurch.*

Solicitors for respondents: *Lovell, Son & Co., for Druitt & Druitt, Christchurch.*

A. P. P. K.

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C. A.

1898

*March 3.*

[IN THE COURT OF APPEAL.]

## DUNN *v.* APPLETON.

*Practice—Costs—Application for Judgment under Order XIV.—Leave to Defend—Case remitted to County Court—Costs of Application under Order XIV. to be Costs in the Cause—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 116—*Order XIV., r.* 9 (*a*).

In an action to recover under a contract a sum above 20*l.*, but less than 50*l.*, the plaintiff applied for judgment under Order XIV. The defendant obtained leave to defend on payment of the amount claimed into court, and the money was paid in. An order was subsequently made on the application of the plaintiff, and affirmed by a judge at chambers, remitting the action to the county court, and directing that the costs of the application under Order XIV. should be costs in the cause. On appeal:—

*Held*, that as the case was not brought within s. 116 of the County Courts Act, 1888, or Order XIV., r. 9 (*a*), there was no jurisdiction to make the order as to the costs of the application under Order XIV.

*Quære*, whether an order purporting to make costs under Order XIV. costs in a county court action could be made at the hearing under Order XIV., r. 9 (*a*).

APPEAL from an order of a judge at chambers.

The action was brought to recover 20*l.* 10*s.* alleged to be due under a contract. On an application by the plaintiff to enter judgment under Order XIV., the master gave the defendant leave to defend on bringing the amount claimed into court, which the defendant did. Subsequently, on the application of the plaintiff, the master ordered that the case should be remitted to the county court, and also that the costs of the application pre-

viously made under Order XIV. should be costs in the cause. The defendant appealed against the second part of this order, which was affirmed by Day J. at chambers.

The defendant appealed.

1897. Dec. 21. *C. B. Marriott*, for the defendant. The order of the master cannot be supported under Order XIV., r. 9 (*a*), because it was not made at the hearing of the application. Nor can it be supported under s. 116 of the County Courts Act, 1888, because the proviso to that section applies only where the plaintiff obtains judgment under Order XIV., and the provision as to the certificate of a judge applies only where the action is tried in the High Court. Further, if the order stands it would give the plaintiff some costs of the application on the High Court scale contrary to the provisions of the section: *White* v. *Cohen*. (1)

*M. Shearman*, for the plaintiff. The master was justified in making the order as a part of the proceedings on the application to remit the action; and at any rate the judge at chambers had jurisdiction under s. 116, sub-s. 2, of the County Courts Act, 1888, to make an order allowing these costs. [He cited *Harris* v. *Judge*. (2)]

*C. B. Marriott*, in reply.

*Cur. adv. vult.*

1898. March 3. The judgment of the Court (A. L. Smith, Rigby and Collins L.JJ.) was read by

COLLINS L.J. This was an action for 20*l*. 10*s*. alleged to be due under a contract.

On November 5 an order was made under Order XIV., giving defendant leave to defend on his bringing 20*l*. 10*s*. into court within seven days. This the defendant did. On November 19 Master Johnson made an order at the instance of the plaintiff remitting the case to the county court, and directing that the costs of the Order XIV. application should be costs in the cause in the county court. On appeal against this latter part of the order Day J. affirmed the master, and the point now comes

(1) [1893] 1 Q. B. 580. (2) [1892] 2 Q. B. 565.

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before us on appeal from the learned judge. It was contended for the appellant that, the case being one that might have been brought in the county court, there was no jurisdiction in the master to make the order, the conditions under which alone Order XIV. costs can be recovered in such actions, namely, either under Order XIV., r. 9 (*a*) (1), or under s. 116 of the County Courts Act, 1888, not being performed.

We think the case is concluded by *Harris* v. *Judge* (2), followed by *White* v. *Cohen* (3), both decisions of the Court of Appeal.

It is not necessary to repeat the train of reasoning by which the Court on an examination of the 65th and 116th sections of the County Courts Act, 1888, came to the conclusion that the latter section cuts down the effect of the former, and applies to all actions, whether remitted or not, which might have been brought in the county court.

The result of these decisions is, in the case of a remitted action, that if the plaintiff recover 20*l.* or upwards but less than 50*l.* in contract—and the plaintiff here cannot do more—he shall not be entitled to more costs than he would have been entitled to if he had brought the action in the county court, for he cannot bring himself within the proviso as to Order XIV. in s. 116, neither can he get the benefit of a certificate or order in chambers under the same section. "The clause relating to the certificate or order allowing costs," says Lindley L.J., in delivering the judgment of the Court in *White* v. *Cohen* (3), "can only come into operation where the action is tried in the High Court." Therefore, even if the order in question could be construed as such an order allowing costs, it could not help the plaintiff. Neither does he come within the proviso in the section as to Order XIV., for he did not get judgment under that order. Neither was it an order made at the hearing under

(1) Order XIV., r. 9 (*a*): "The costs of and incident to all applications under this order shall be dealt with by the judge on the hearing of the application, who shall order by and to whom, and when the same shall be paid, or may refer them to the judge at the trial. Provided that in case no trial afterwards takes place, or no order as to costs is made, the costs are to be costs in the cause."

(2) [1892] 2 Q. B. 565.

(3) [1893] 1 Q. B. 580.

Order XIV., r. 9 (*a*), even if such an order could have been made at the hearing, purporting, as it did, to make costs under Order XIV. costs in a county court action.

It follows, therefore, that the appeal must be allowed.

*Appeal allowed.*

Solicitor for plaintiff: *David Davis.*

Solicitors for defendant: *Norris & Son, for Herbert Simpson, Leicester.*

A. M.

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[IN THE COURT OF APPEAL.]



## QUEENSLAND NATIONAL BANK, LIMITED *v.* PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY.

*Ship—Bill of Lading—Implied Warranty—Bullion-room—Fitness to resist Thieves.*

Boxes of gold, shipped abroad, under a bill of lading, for delivery in London, were placed in the bullion-room of the ship from which one of the boxes was stolen during the voyage. The bill of lading did not contain any mention of a bullion-room, but it was known to the plaintiffs that the defendants' vessels were provided with such rooms, and it was in the contemplation of both parties to the contract that the gold was to be carried in a bullion-room:—

*Held*, affirming the judgment of Mathew J., that there was an implied warranty that the bullion-room in which the gold was stowed was so constructed as to be reasonably fit to resist thieves.

APPEAL from a judgment of Mathew J.

This was an action for the non-delivery of one out of ten boxes, each containing 5000 sovereigns, shipped at Sydney for carriage to London on one of the defendants' steamers. The bill of lading, so far as it related to the shipping of the gold, was as follows: "Shipped in good order and well-conditioned by the Queensland National Bank, Limited, in the Peninsular and Oriental Steam Navigation Company's steamship *Oceana*, now at Port Jackson, ten boxes, each said to contain 5000 sovereigns of gold, to be delivered, subject to the conditions

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and exceptions at foot hereof, in the like good order and well-conditioned, at the port of London, unto Lloyd's Bank, Limited." The exceptions referred to were: "Robbers or thieves by sea or land, loss by thefts or robberies by sea or land, and whether by persons directly or indirectly in the employment or service of the company or otherwise, accidents, loss or damage from . . . . defects, latent or otherwise, in hull, tackle, boilers, or machinery, or their appurtenances, and all perils, dangers, and accidents of the seas, rivers, land, carriage, and navigation of what kind soever."

The following notice was printed on the bill of lading: "Shippers are requested to note particularly the terms and conditions of this bill of lading with reference to the validity of their insurance upon their goods. Shippers may, by paying a higher rate of freight, ship their goods under bill of lading (known as the red bill of lading) under which the company take responsibilities not imposed by this form." It was admitted that one of the boxes of gold received by the defendants on board the *Oceana*, and placed in the bullion-room of that ship, had been stolen. An order was made at chambers that the questions whether there was any warranty by the defendants under the bill of lading that the room in which the bullion was stowed was so constructed as to be reasonably fit to resist thieves, and whether, if such warranty was broken, the exceptions apply, should be tried before the trial of the action.

These questions were accordingly tried before Mathew J., who gave judgment for the plaintiffs.

The defendants appealed.

*Joseph Walton, Q.C.*, and *Bray, Q.C.*, for the defendants. The only warranty in the case was that the ship should be fit to carry the cargo. There is no implied warranty as to the construction of the receptacle for the gold, or any indication that the gold was to be carried in a particular place or manner. It might have been carried in several ways, as, for instance, under other cargo, so that it could not be got at, or it might have been secured by a watch being kept over it. This dis-

tinguishes the case from *Maori King* v. *Hughes* (1), where the bill of lading related to frozen meat, and was directed specifically to the cargo to be carried, and from *Tattersall* v. *National Steamship Co.* (2), where the cattle could only be carried in one way.

*Scrutton*, for the plaintiffs. In *Steel* v. *State Line Steamship Co.* (3) Lord Cairns lays it down that a contract to carry and deliver wheat at a port not merely engaged the ship to deliver the goods in the condition mentioned, but contained an engagement by the shipowner that the ship was reasonably fit to accomplish the service which the shipowner engages to perform. This has been applied in many cases and to various kinds of cargo, as for instance to jute: *Gilroy* v. *Price* (4); and it is applicable to the present case. The particular peril to which this cargo was exposed was theft, and a warranty must be implied that at the port of lading the ship was reasonably fit to meet that peril.

*Bray, Q.C.*, in reply.

A. L. SMITH L.J. I am of opinion that the judgment in this case should be affirmed. The action is brought for non-delivery under a bill of lading of a box containing 5000 sovereigns. The *Oceana*, in which the gold was carried, was one of the defendants' line of steamers, and beyond all doubt on this line, and I daresay on others, bullion-rooms are provided for the stowage of gold for the purpose of obtaining this class of traffic. The bill of lading states the contract as to the carriage of the bullion in this form: "Shipped in good order and well-conditioned by the Queensland National Bank, Limited, in the Peninsular and Oriental Steam Navigation Company's steamship *Oceana*, now at Port Jackson, ten boxes, each said to contain 5000 sovereigns of gold, to be delivered, subject to the conditions and exceptions at foot hereof, in the like good order and well-conditioned, at the port of London, unto Lloyd's Bank, Limited." I should add that in the bill of lading there are very large exceptions to the liability of the ship—large

(1) [1895] 2 Q. B. 550.
(2) (1884) 12 Q. B. D. 297.
(3) (1877) 3 App. Cas. 72, at p. 76.
(4) [1893] A. C. 56.

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enough to cover almost anything that could happen as regards fixing the ship with liability.

The 5000 sovereigns having been lost on the voyage, this action is brought; and the question which arises is whether upon this bill of lading there is an implied warranty that, when the ship sailed, the bullion-room into which the gold was to be put should be so constructed as to be reasonably fit to resist thieves. The importance of the matter is obvious, because if the plaintiffs have to rely upon the bill of lading, and not upon an implied warranty, the defendants will in all probability have an answer to the action under the exceptions to which I have referred.

It appears to me that the foundation of the judgment of the learned judge is to be found in these lines of his judgment. He says: "In this case I assume, for the purpose of my decision, that the vessel in question, the *Oceana*, like others of her class, was furnished with a receptacle for bullion and valuables, usually called the specie-room; and that the contract in the bill of lading was entered into with the knowledge and upon the footing that this receptacle had been provided for the safe carriage of the gold mentioned in the bill of lading." When it was pointed out to the learned counsel for the defendants that if this assumption is correct the case came within the four corners of the case of *Maori King* v. *Hughes* (1), some question was raised as to whether any such admission was made at the hearing, and whether the learned judge in making this assumption had not gone beyond anything admitted at the trial. It seems to me, from the account of what then took place, that the learned judge was justified in the assumption he made. I conclude, then, that the contract was made in relation to the carriage of the gold in a bullion-room. That room was there to secure the contents from thieves. I cannot see why, under these circumstances, it should be wrong to put the question whether the room was reasonably fit, at the time when the voyage commenced at the port of loading, to protect the gold. On the authorities, it seems to me that this is a proper question to raise, as similar

(1) [1895] 2 Q. B. 550.

questions have been raised in the case of various cargoes, such as cattle, in *Tattersall* v. *National Steamship Co.* (1); sugar, in *Stanton* v. *Richardson* (2); frozen meat, in *Maori King* v. *Hughes.* (3) In some of those cases the warranty applied, as in this case, to the part of the ship appropriated to the stowage of the particular cargo. With these cases to guide me, I come to the conclusion that the decision appealed from is right, though even without them I should have come to the same conclusion. The appeal will, therefore, be dismissed.

CHITTY L.J. I am of the same opinion. The warranty relied on is not express but implied, and I think the learned judge was justified in making the assumption which he made. This ship, like others of her class, had a bullion-room, and that bullion-room was in the contemplation of the parties when they signed the bill of lading. The main peril to which gold is exposed in transit by sea is from thieves, and the object of a bullion-room is the prevention of theft. The question, therefore, was rightly put whether the bullion-room was so constructed as to be reasonably fit to carry out that object and to resist thieves. It is not arguable, in my opinion, that there was not some warranty. The question whether, in point of fact, the bullion-room was reasonably fit to resist thieves is left open by the decision that there is a warranty that it must be reasonably fit for the special purpose to which a bullion-room is applied.

COLLINS L.J. I am of the same opinion. I think there is no magic in this case in the word "seaworthiness," or in the fact that the contract is contained in a bill of lading. On that point I think the observations of Lord Esher M.R. in the case of the *Maori King* v. *Hughes* (4) are in point. He says: "The original obligation that the machinery shall at the starting of the vessel be fit for the purpose for which it is supplied, and for which payment is made, is one which the

(1) 12 Q. B. D. 297.
(2) (1872) L. R. 7 C. P. 421; (1874) L. R. 9 C. P. 390.
(3) [1895] 2 Q. B. 550.
(4) [1895] 2 Q. B. 550, at p. 554.

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Court can see that as a matter of business both parties must have intended, and, that being so, an agreement to that effect must be inferred or implied in the bill of lading, as it would be in any other document under similar circumstances."

When we introduce into this case the fact which forms the basis of the learned judge's judgment, namely, that both parties were contracting on the footing that this bullion was going to be carried in a bullion-room, I think we at once arrive at this —that there was an implied contract on the part of the ship-owner that the bullion-room should be a reasonable one. The next step is: Does that imply that it shall be reasonably fit to resist thieves? There must be some standard by which the fitness must be determined; and the only one which occurs to me is that of fitness to resist thieves.

It may be open at the trial on the question of reasonableness to adduce arguments about the possible degree of care contemplated. The higher the care the less degree of necessity for strength in the bullion-room; but on this point I say no more, because that is a matter for the judge who tries the case.

I think the learned judge was justified in the assumption that the contract was made on the basis that there should be a bullion-room: that means a bullion-room reasonably fit for its purpose; and that means reasonably fit to resist thieves.

I agree, therefore, that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors for plaintiffs: *Waltons, Johnson, Bubb & Whatton.*
Solicitors for defendants: *Freshfields & Williams.*

A. M.

## In the Matter of THE COMPANIES ACTS, 1862 to 1890, and In the Matter of THE NEW PAR CONSOLS, LIMITED.

1898 *Jan.* 29.

*Company—Winding-up—Statement of Affairs—Refusal by Director or Officer to submit Statement—Jurisdiction of Court—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 7.

Where an order has been made in a county court for the winding-up of a company, and a director or other officer of the company, having been required by the official receiver to submit to him a statement of the affairs of the company, under s. 7 of the Companies (Winding-up) Act, 1890, has refused to do so, the Court has jurisdiction to order the director or other officer to submit the statement, notwithstanding that s. 7, sub-s. 5, provides that "if any person, without reasonable excuse, makes default in complying with the requirements of this section, he shall be liable to a fine."

Appeal by C. Gregory against an order of the judge of the Truro County Court.

On August 14, 1897, an order was made in the Truro County Court for the winding up of the New Par Consols, Limited.

On August 18, 1897, the official receiver served on C. Gregory a notice under s. 7 of the Companies (Winding-up) Act, 1890, requiring C. Gregory to submit to him, within fourteen days of the winding-up order, a statement of affairs, in duplicate, of the said company.

C. Gregory had been, by the articles of association, appointed managing director of the company. On August 3, 1896, he committed an act of bankruptcy upon which he was adjudicated a bankrupt on October 9, 1896.

The articles of association provided (art. 83) that the office of director should be vacated if he became a bankrupt; and (art. 93) that the said Charles Gregory should be the first managing director of the company, and should not be removable from office otherwise than by his own resignation.

C. Gregory did in fact act as a director of the company in September, 1896.

C. Gregory refused to submit any statement of affairs of the

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NEW PAR CONSOLS, *In re.*

company upon the ground that he had ceased to be a director of the company more than one year before the date of the winding-up order. The official receiver thereupon applied in the county court for an order directing C. Gregory to submit and verify a statement of affairs of the company pursuant to the provisions of s. 7 of the Companies (Winding-up) Act, 1890 (1), and the judge made an order accordingly.

C. Gregory appealed.

*R. G. Glenn*, for the appellant. The appellant could not be required to submit a statement of affairs because he had ceased to be a director more than one year before the date of the winding-up; when he was adjudicated a bankrupt, the commencement of the bankruptcy dated back to August 3, 1896, when the act of bankruptcy was committed. By the articles of association he ceased to be a director after August 3. The Court had no jurisdiction to make an order that the statement of affairs should be submitted. This is a statutory liability, and a special remedy is provided by sub-s. 5 of s. 7, which imposes a penalty, and therefore there is no other remedy.

*Muir Mackenzie*, for the respondent. The Court which has jurisdiction to make a winding-up order has, by s. 1, sub-s. 6,

(1) The Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 7: "(1.) Where the Court has made an order for winding up a company, there shall be made out and submitted to the official receiver a statement as to the affairs of the company in the prescribed form, verified by affidavit, and shewing the particulars of the assets, debts, and liabilities of the company, the names, residences, and occupations of the creditors of the company, the securities held by them respectively, the dates when the securities were respectively given, and such further or other information as may be prescribed or as the official receiver may require.

"(2.) The statement shall be submitted and verified by one or more of the persons who are at the time of the winding-up order the directors and by the person who is at that time the secretary or other chief officer of the company, or by such of the persons being or having been directors or officers of the company or having taken part in the formation of the company at any time within one year before the order for winding up the company, as the official receiver, subject to the direction of the Court, may require to submit, and verify the same."

"(5.) If any person, without reasonable excuse, makes default in complying with the requirements of this section, he shall be liable to a fine not exceeding ten pounds for every day during which the default continues."

"for the purposes of that jurisdiction, all the powers of the High Court." The High Court has undoubtedly jurisdiction to make such an order as was made in this case. In Palmer's Company Precedents there is a form of such an order. (1) In *In re Columbian Gold Mines* (2) Vaughan Williams, J., upon an application to commit the secretary of a company for not complying with an order made by the registrar to submit a statement of affairs, said that applications for such orders ought to be made to the judge.

LORD RUSSELL of KILLOWEN C.J. This is an appeal by Charles Gregory against an order of the Truro County Court, by which he was directed as one of the persons named in the schedule as a director, or a former director, on or before a day named to submit and verify a statement of the affairs of the company, under s. 7 of the Companies (Winding-up) Act, 1890. The county court had jurisdiction to deal with the matter under s. 1, sub-s. 6, of the Act of 1890, and that sub-section provides that "every Court," and therefore the county court, "having jurisdiction to wind up a company shall, for the purposes of that jurisdiction, have all the powers of the High Court."

Now the powers of the High Court arise from two sources, express legislation dealing with the matter in question, and the inherent power which the Courts possess to make such orders as are necessary for the purposes of carrying out the judicial duties and functions with which they are charged and for giving effect to those orders where necessary, when contumaciously disregarded or treated with contempt. In this case three points are made on the part of the appellant. The first is that he had no notice of this application. It is clear that he had notice of the application. The next point is that the Court had no jurisdiction to make the order, upon the ground that the appellant did not come within the terms of the section under which the order was made, and that point requires a little examination. By s. 7, sub-s. 1, it is provided that, where a winding-up order has been made, a statement of the affairs and assets of the company shall be made out, verified, and

(1) Vol. ii. Form 148. (2) W. N. (1894) 92; 42 W. R. 624; 8 R. 411.

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Lord Russell C.J.

submitted to the official receiver. It is perfectly clear that that is an essential part of the proceedings in the winding-up—an essential part without which the whole machinery of the winding-up must be most certainly imperfect. Then sub-s. 2 provides that the statement shall be submitted and verified by one or more of the persons who at the time of the winding-up were the directors, and by the person who is at the time secretary or chief officer, or by such of the persons . . . being or having been directors within one year before the order for the winding-up, as the official receiver may require so to do. Now, in this case the winding-up order was made on August 14, 1897; on August 3, 1896, an act of bankruptcy was committed by the appellant; in September this gentleman appears to have been acting as a director, and acting as a director in a very important way, namely, by issuing debentures of the company and signing in that character. On October 9, 1896, he was adjudicated a bankrupt, the effect of which undoubtedly is that, for certain purposes, the bankruptcy relates back to the date of the act on which bankruptcy is founded. It is clear, therefore, that if the acting in September of 1896 is evidence of his being a director within the meaning of this section within the year, then he comes within the section. It is clear, upon looking at this section, that the object is to get at the persons who have the information which the Court requires for the purposes of the winding-up; and I think that even if he had properly and legally ceased to be a director, but was de facto acting as a director within the prescribed period of a year, he was a director within the meaning of the section, and subject to the obligation to prepare and sign the accounts which are required by that section. It seems to me he was a director, and I think that that view is corroborated by the articles of association. The last point that was made was that the Court had no jurisdiction to make the order at all. That argument is based on sub-s. 5 of s. 7, which provides that a person may be made liable to a fine if he does not comply with the requirements of the section. Looking again at the purpose of this Act, and endeavouring to ascertain its meaning, I cannot think that this was meant to take away that which I

conceive is within the inherent power of the Courts, namely, to make such orders as are necessary to give effect to the objects with which they have to deal, and to enforce such orders, if necessary, by process of the Court. I come to the conclusion that none of these grounds of objection to the order can be supported, and that this appeal must be dismissed.

MATHEW J. I agree that the Court had power to make this order. The order having been made, the usual consequences will follow if it is disobeyed—that is, will follow from the power conferred upon the Court. There is indeed a special provision, which is in no way inconsistent with the authority of the Court to enforce compliance with the provisions of the Act, that in cases where it may appear to be a suitable remedy there shall be penalties inflicted on a man who refuses to comply with the requirements of s. 7. That clause is not exclusive of the jurisdiction already existing in the Court to make this order. I agree that the appeal must be dismissed.

*Appeal dismissed.*

Solicitors for appellant: *Gregory & Co.*

Solicitor for respondent: *The Solicitor to the Board of Trade.*

W. A.

1898
*March 4.*

## THE QUEEN *v.* SHARMAN AND OTHERS, JUSTICES. *Ex parte* DENTON.

*Licensing Acts—Licence—Practice—Application for new Licence—Jurisdiction of Justices—Power to require Witnesses to be Sworn—Certiorari.*

On the hearing, at a general annual licensing meeting, of an application for a new licence for a hotel, witnesses were called on behalf of persons who opposed the granting of the licence, and these witnesses gave evidence on oath. Another person then appeared to oppose, and proposed to make statements of fact. The justices required that he should be sworn. He refused, and they declined to hear him, and granted the licence.

On an application for a certiorari, or for a mandamus to the justices to hear and determine:—

*Held*, that the certiorari ought not be granted, and *semble*, that, as the justices at the licensing meeting were not acting as a court of summary jurisdiction, but in an administrative capacity, certiorari would not lie:

*Held*, also, that the justices were acting within their jurisdiction in refusing to hear statements not made upon oath, and a mandamus must be refused.

APPLICATION for a certiorari to bring up and quash an order of justices granting a licence, or for a mandamus to order them to hear and determine the application for the licence.

The facts, so far as material, were as follows:—

At the general annual licensing meeting on August 23, 1897, Mr. William Douglas Knight applied to the justices for the Wellingborough Division of the county of Northampton for a provisional new licence for a proposed hotel. The application was opposed, and a solicitor appeared before the justices in support of the opposition, and called and examined several witnesses, who were sworn, and gave their evidence upon oath. After these witnesses had been examined, Mr. George Denton, who had not been sworn or given evidence, but who was a party to the above-mentioned opposition, stated to the justices that he also desired to oppose the granting of the licence, and to make certain statements of fact. The justices ruled that he must be sworn, and give evidence upon oath. He declined to be sworn, and the justices then refused to hear him, and they granted the application for a licence. An order nisi was

afterwards obtained, on behalf of Mr. Denton, for a certiorari to bring up and quash the order of the justices, or, in the alternative, for a mandamus to the justices to hear and determine the case.

*Lawson Walton, Q.C.*, and *Pollard*, for Knight the holder of the licence, shewed cause against the order nisi for a certiorari. Justices at a licensing meeting are not a court, nor is their decision to grant or refuse a licence a "conviction or order": *Boulter* v. *Kent Justices*. (1) It follows that certiorari will not lie: *Reg.* v. *Watermen's Co.* (2), a case of a waterman's licence: *Reg.* v. *London County Council, Re Empire Theatre* (3), a case of a licence for music and dancing. The decision of the Court of Appeal in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (4) and the case of *Reg.* v. *Overseers of Salford* (5) also support this view. The statutory jurisdiction to grant licences is conferred on the justices by the Alehouse Act, 1828 (9 Geo. 4, c. 61), s. 1, which expressly describes the special session of the justices as the "general annual licensing meeting." Mr. Denton is not a person aggrieved: *Rex* v. *Inhabitants of Taunton St. Mary* (6); *Rex* v. *Justices of Middlesex* (7); *Reg.* v. *Justices of Surrey* (8); *Reg.* v. *Justices of Surrey*. (9)

*Asquith, Q.C.* (*Blaiklock* with him), for Denton, in support of the order nisi. Certiorari will lie. *Boulter* v. *Kent Justices* (1) does not cover the present case, and Mr. Denton, as a resident in the neighbourhood, is entitled to be heard to object to the granting of the licence, and is therefore a person aggrieved.

WRIGHT J. We are both quite clear that this is not a case for certiorari. The applicant has not made out that he is aggrieved in such a sense as to give him a right to this remedy,

(1) [1897] A. C. 556.
(2) [1897] 1 Q. B. 659.
(3) (1894) 71 L. T. (N S.) 638.
(4) [1892] 1 Q. B. 431.
(5) (1852) 18 Q. B. 687.
(6) (1815) 3 M. & S. 465.
(7) (1832) 3 B. & Ad. 938.
(8) (1870) L. R. 5 Q. B. 466.
(9) (1888) 52 J. P. 423.

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or that in our discretion we ought to assist him. Further, it seems to us that the decision of the justices to grant the licence is not a judicial order which can be brought up by that process, but is a conclusion formed in the exercise of their administrative functions as the licensing authority.

*Order nisi for certiorari discharged.*

*Lawson Walton, Q.C.*, and *Pollard*, for Knight, and *Candy, Q.C.*, and *Ryland Adkins*, for the justices, shewed cause against the order nisi for a mandamus. The justices have heard and determined the application for a licence. In requiring the evidence in support of an objection to the licence to be given upon oath, they were acting within the discretion which they possess as to regulating the procedure in cases coming before them. They were entitled to require that Mr. Denton should follow the same course as the other witnesses, who had already given evidence upon oath. They clearly have the power to administer an oath: Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 16. It is only reasonable that statements of fact, made for the purpose of inducing the justices to refuse a licence, should be made under the sanction of an oath, and that the witnesses making such statements should be subject to cross-examination.

*Asquith, Q.C.* (*Blaiklock* with him), in support of the order nisi for a mandamus. The argument against the order for a certiorari, which has prevailed, tells in favour of the application for a mandamus. The justices are clearly not bound to require an oath, and in doing so they impose a condition which they are not entitled to impose. Where it was intended that the justices should hear evidence on oath, it was expressly so provided; for, in the case of an application for the renewal of a licence, by the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 42, sub-s. 3, "The justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath." This express provision goes to shew that in cases to which it does not apply the practice is intended to be different.

[He referred to *Reg.* v. *London County Council, Ex parte Akkersdyk.* (1)]

WRIGHT J. I am of opinion that the order nisi for a mandamus ought to be discharged. As to the substantial question, I have come to the conclusion that it is left in the discretion of the justices to determine what course of procedure they will adopt upon the hearing of applications such as that now in question. No doubt they ought not to act too strictly, and members of the public residing in the neighbourhood ought to have the opportunity of being heard to express their views within reasonable limits; but I cannot see any power for everyone to come forward before the magistrates and claim to give evidence either on oath or otherwise than upon oath, and insist that they have an absolute right to do so. I do not mean to say that a member of the public resident in the locality may not in certain cases have a right to put forward his views, but in the present case I can see very little ground to support the application which has been made. I have no reason to think that there has been any miscarriage or substantial denial of justice. Lastly, the action on the part of the magistrates which is complained of took place on August 23, and the order nisi for a mandamus was not moved for until December. Under such circumstances as those of the present case a mandamus ought not to be granted, unless the motion is made at as early a period as conveniently can be after the occurrence of the circumstances relied on in support of the application.

DARLING J. I am of the same opinion. It is perfectly clear that the justices had a discretion to hear witnesses upon oath, and in this case all the other witnesses had already been heard upon oath, and the justices had power to say that they would not hear any further witnesses except upon oath. It appears that Mr. Denton had read some report of the decision of the House of Lords in *Boulter* v. *Kent Justices.* (2) He had misunderstood that decision, and he evidently came to the licensing meeting in order to assert a right of appearing before

(1) [1892] 1 Q. B. 190. (2) [1897] A. C. 556.

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the justices, and making statements as to facts without being sworn, which he imagined that decision gave him. It is very unfortunate for him that he had read the case at all.

*Order nisi for mandamus discharged.*

Solicitor for prosecutor: *Arthur Blott, for James Jackson, Northampton.*

Solicitors for holder of the licence: *Metcalfe & Birkett, for Becke & Green, Northampton.*

Solicitor for justices: *W. Hirst Simpson, Higham Ferrers.*

P. B. H.

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*March 3.*

## THE QUEEN *v.* COCKSHOTT AND OTHERS.

*Justices—Jurisdiction—Right to be tried by Jury—Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 17, sub-s. 2.*

Where a person appears before a court of summary jurisdiction, charged with an offence to which s. 17 of the Summary Jurisdiction Act, 1879, applies, the Court ought, in pursuance of sub-s. 2, to inform him of his right to be tried by a jury before he pleads to the charge. If he be not informed of that right and, after the charge has been gone into, pleads guilty, the conviction is bad.

*Semble*: It is immaterial whether or not he knew of his right to be tried by a jury, and immaterial whether or not the Court knew, before the proceedings commenced, that he meant to plead guilty in the course of the case.

RULE, obtained on behalf of Joshua Rickaby, for a certiorari to bring up and quash a conviction by the respondents, two justices of the borough of Southport, sitting as a court of summary jurisdiction.

The information against Rickaby charged him with having used an office for the purpose of betting with persons resorting thereto contrary to 16 & 17 Vict. c. 119, s. 3.

It appeared from the affidavits filed in support of and against the rule that when the information came on to be heard the town clerk of Southport appeared for the prosecution, and a firm of solicitors appeared for Rickaby. Before the proceedings commenced the town clerk and Rickaby's solicitors com-

municated with each other for some time in view of the magistrates and their clerk. When their communication ended, the defendant pleaded not guilty, and the town clerk proceeded to open the case against him. A printed form was supplied for the use of the Court containing the words to be addressed to the defendant, under s. 17 of the Summary Jurisdiction Act, 1879 (1), in cases to which that section applies, informing him of his right to be tried by a jury. The clerk to the magistrates was prepared to address those words to the defendant, but, in view of the communication which had been seen to be going on between the defendant's solicitors and the town clerk, omitted to do so, nor did the defendant claim to be tried by a jury. After the town clerk had opened the case for the prosecution, the solicitor who conducted the case as advocate for the defendant said that, if the facts had been more fully opened, he would have been able to take a course which might have saved the time of the Court. The town clerk thereupon opened the facts more fully; after which the defendant's solicitor said he was prepared to advise his client to plead guilty, and to ask the

(1) The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 17, sub-s. 1: "A person when charged before a court of summary jurisdiction with an offence, in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault, may, on appearing before the Court and before the charge is gone into but not afterwards, claim to be tried by a jury, and thereupon the court of summary jurisdiction shall deal with the case in all respects as if the accused were charged with an indictable offence and not with an offence punishable on summary conviction, and the offence shall as respects the person so charged be deemed to be an indictable offence . . . ."

Sub-s. 2: "A court of summary jurisdiction, before the charge is gone into in respect of an offence to which this section applies, for the purpose of informing the defendant of his right to be tried by a jury in pursuance of this section, shall address him to the following effect: 'You are charged with an offence in respect of the commission of which you are entitled, if you desire it, instead of being dealt with summarily, to be tried by a jury. Do you desire to be tried by a jury?' —with a statement, if the Court think such statement desirable for the information of the person to whom the question is addressed, of the meaning of being dealt with summarily, and of the assizes or sessions (as the case may be) at which such person will be tried if tried by a jury."

[Offences under s. 3 of 16 & 17 Vict. c. 119, are triable before courts of summary jurisdiction, and offenders may be imprisoned for any time not exceeding six calendar months.]

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magistrates to hear him in mitigation of punishment. The chairman, however, intimated that the Court would like to hear the evidence. The evidence of two witnesses for the prosecution was then heard; after which the defendant's solicitor withdrew the plea of not guilty; pleaded guilty on behalf of his client, and addressed the Court in mitigation of punishment. The magistrates fined the defendant 50*l.* and costs, with an alternative of three months' imprisonment. The affidavits in support of the rule stated that neither the defendant nor his solicitors knew that he had a right to be tried by a jury, and that if the defendant had known of such right he should have elected to have been so tried.

The rule was obtained on the ground (inter alia) that the justices had no power to convict the defendant because they had not complied with s. 17, sub-s. 2, of the Summary Jurisdiction Act, 1879, by informing him, before the charge was gone into, of his right to be tried by a jury.

*Danckwerts*, for the justices, shewed cause against the rule. When the defendant pleaded guilty there was no issue left between the prosecution and himself, and, therefore, nothing which could be tried by a jury. The words in s. 17 of the Summary Jurisdiction Act, 1879, "before the charge is gone into," must mean before plea. The magistrates knew from the first that the defendant intended to plead guilty, and it would have been an unmeaning form to give him the information specified in sub-s. 2, and ask him if he desired to be tried before a jury. The course taken by the defendant and his solicitors constituted a waiver of his right to be tried by a jury. It is competent to a defendant before justices to waive the performance of preliminary matters: *Turner* v. *Postmaster-General.* (1)

*J. R. Randolph*, for the applicant, supported the rule. Sect. 17 makes it a condition precedent to the power to convict that the Court should inform the defendant of his right to be tried by a jury. Under sub-s. 1 he can only claim his right "on appearing before the Court and before the charge is gone into." Sub-s. 2 intends that he shall be told of his right at the only time it

(1) (1864) 5 B. & S. 756.

can avail him to claim it. Here the charge was gone into without the defendant having been so told, and the conviction was, therefore, bad. There was no waiver, because neither the defendant, nor his solicitors, knew of his right. A person cannot waive a right of which he does not know.

WRIGHT J. This is a case of some importance. The applicant for a certiorari appeared before the magistrates to be tried upon a charge, preferred under 16 & 17 Vict. c. 119, which rendered him liable, upon conviction, to be imprisoned for a period not exceeding six months. Having been brought before the Court on that charge, and s. 17 of the Summary Jurisdiction Act, 1879, applying to the case, it became material whether he desired to claim to be tried by a jury. He came into court, and the proceedings were about to begin in the ordinary way, when the prosecuting solicitor and the defendant's solicitors communicated with each other, and the fact was obviously brought to the apprehension of the Court that the defendant intended to plead guilty, but that, for reasons which are quite intelligible, he did not wish to do so at once. He pleaded "not guilty," and his advisers, after the case had proceeded for a time, having got out what facts they wanted, withdrew his plea and pleaded "guilty"; he was fined and the matter ended. The clerk to the magistrates knew his duty under s. 17, sub-s. 2, and, if the case had not taken the course it did take, would have informed the defendant of his right to be tried by a jury, but under the circumstances thought it unnecessary to do so. The clerk may have been misled by the communication which went on between the solicitors before the case began.

The real question we have to determine is whether it is essential to the validity of the conviction that the information with respect to the right to a trial by jury should have been given to the defendant as provided by s. 17, sub-s. 2. It has been pointed out that the first sub-section has a material bearing upon the question. It is to the effect that the accused person may, "before the charge is gone into but not afterwards," claim to be tried by a jury. It is clear, therefore, that unless he has

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knowledge of the right to be tried by a jury the provisions of s. 17 are of no avail to him. That strongly goes to shew that he must have the information provided for by sub-s. 2 at the only time at which he can get the benefit of the section, namely, before the charge is gone into. The words mentioned in sub-s. 2, or words to the same effect, are to be addressed "for the purpose of informing the defendant of his right to be tried by a jury in pursuance of this section." I think it would be wrong to fritter away the protection which the section intends to give to accused persons. It intends to give them protection in the broadest and most generous way by providing that the option of trial by jury shall be put before any accused person before the charge is gone into. I think the option ought to be put before him before he is asked whether he pleads guilty or not guilty. The protection is possibly even more necessary where he intends to plead guilty. He might plead guilty because, though he had no great confidence in the tribunal before which he appeared, he thought that by pleading guilty he would get a lighter sentence; whilst, if he knew he had a right to be tried by a jury, he would prefer to avail himself of that right. I think it is immaterial whether in fact he knows that he has the right or not; he ought to be informed of it by the Court. I come to the conclusion that in the present case the defendant did not know of the right. His solicitors say they did not. As to the waiver which has been suggested, there cannot be a waiver of a right which the defendant does not know that he has. I doubt whether he could waive the right to be informed of his option to be tried by a jury if he knew that he had the option. I am inclined to think that, the duty to inform having been imposed upon the Court for the protection of all accused persons, the right to be informed could not be waived. I am of opinion that, the provisions of sub-s. 2 having not been complied with, this rule ought to be made absolute and the conviction quashed.

DARLING J. I am of the same opinion. In my view the notice required to be given to a defendant under sub-s. 2 should be given before he has pleaded. The words in sub-s. 2 are,

"before the charge is gone into"; but it is not enough to take them alone: the words in sub-s. 1, "on appearing before the Court and before the charge is gone into," must also be taken into consideration. The claim to be tried by a jury under sub-s. 1 must be made on appearance and before the charge is gone into. Reading the two sub-sections together, they mean, I think, that he must be informed of his right before he pleads. The Legislature intended to give him the chance of being tried by a jury for any reason which might lead him to prefer a jury. He might think it as well in some respects to plead guilty, and in others not. It is important that he should know at the earliest possible moment of the option which is given to him, so that he may make up his mind. The Legislature apparently has, in s. 17, made a distinct exception to the rule that everybody must be presumed to know the law, and I think has provided that the right of an accused person to be tried by a jury must be brought to his mind as a matter of fact before the charge is gone into. I quite agree with the judgment of my brother Wright.

*Rule absolute.*

Solicitors for justices: *Rowcliffes & Co., for John Smallshaw, Southport.*

Solicitors for applicant: *Pritchard, Englefield & Co., for Brighouse, Brighouse & Jones, Southport.*

W. A.

1898
*Feb.* 25

## KNIGHT *v.* LANGPORT DISTRICT DRAINAGE BOARD.

*Sewers, Commissioners of—Sewers Rate—Principle of Assessment.*

A sewers rate ought to be assessed equally, according to their value, on all lands and tenements within the drainage district which derive any benefit from the drainage works, and not differentially in proportion to the amount of the benefit which they respectively derive.

Opinion expressed to the contrary in *Metropolitan Board of Works* v. *Vauxhall Bridge Co.*, (1857) 7 E. & B. 964, overruled.

CASE stated by the quarter sessions for the county of Somerset on appeal against two rates made by the Langport District Drainage Board under the Somersetshire Drainage Act, 1877.

The appellant, J. T. Knight, owns and occupies a house and shop in the parish of Langport within the jurisdiction of the respondent board and of the Somersetshire Drainage Commissioners. It is in respect of the said premises that the rates appealed against were imposed. The respondents are a district drainage board duly constituted in accordance with the provisions of the said Act. The area of the jurisdiction of the Somersetshire Drainage Commissioners comprises several drainage districts of which the Langport drainage district is one, and the commissioners together with the boards of the said districts constitute the drainage authority under the said Act. In addition to the powers vested in the commissioners and district boards under and by virtue of the said Act, and except as expressly varied thereby, there are, by s. 140 of the said Act, vested in them all powers conferred on commissioners of sewers by Act of Parliament, law, or custom. Of the two rates appealed against, one was a special rate, the other a general rate. In accordance with the provisions of the said Act, special rates are leviable by the commissioners and district boards for the purpose of defraying the expenses of any improvements in existing works or the construction of any new works, and form a tax upon owners. All other rates leviable

by the aforesaid bodies are general rates, and form a tax upon occupiers. The two rates in question were made by the Langport District Board partly to meet the precepts whereby the commissioners required payment of the gross amount assessed and charged by them upon the board, and partly to meet the independent requirements of the board. The expenses in respect of which the two rates were made were lawfully incurred by the said commissioners and Langport District Board respectively in respect of the drainage of the Langport district as authorized by the Act; and the aforesaid property of the appellant upon which a portion of the said rates has been charged comes within an area deriving benefit. The appellant objects to the said rates on the ground that, instead of his property being rated equally with all other rateable property within the said Langport district, the respondents have levied a differential rate, and have rated the appellant at a higher rate in proportion to the greater benefit received by his property. The principle adopted by the Langport District Board in the mode of levying the special and general rates made in pursuance of the said Act is as follows: The net annual value of the various lands or properties as assessed in the rate for the relief of the poor in the parish is taken as the basis of the value of such lands or properties for the purpose of apportioning the said drainage rates. The district board have divided the different rateable properties within their district into three classes. Those three classes are relatively formed and arranged upon the principle of proportionate benefit received and danger avoided by the properties contained in each class respectively by virtue of the said Act, and a proportionate or differential rate is levied in each of such three classes respectively. The two rates in question were ordered by the district board to be levied in the said several classes within the district as follows: Special rate: class 1, 2*s.*; class 2, 1*s.* 4*d.*; class 3, 8*d.* in the pound respectively. General rate: class 1, 1*s.*; class 2, 8*d.*; class 3, 4*d.* in the pound respectively. The appellant's property in respect of the rating of which these appeals were brought was placed in class 1, and rated at the highest scale. At the hearing of the appeals the quarter sessions being of opinion that

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in thus classifying the different lands or properties within their district, and levying a proportionate rate as aforesaid, the respondents had acted contrary to law, quashed the two rates subject to a case for the opinion of the High Court.

*J. A. Foote, Q.C.*, and *Garland*, for the respondents. The proper principle of rating to sewers rates is to assess the tenements benefited by the drainage works in proportion to the benefit they respectively receive. In *Bow* v. *Smith* (1) Lord Macclesfield laid it down that the right way of making the assessment "is to assess the particular lands according to the danger they lie in." By the Sewers Act, 1833 (3 & 4 Will. 4, c. 22), s. 14, "it shall be lawful for the said commissioners to make separate and distinct rates as occasion shall require for every separate and distinct level valley or district, *or any part of* such level valley or district." If that language is to be interpreted literally, the commissioners may single out any individual property which in their opinion is deriving a greater benefit than the rest of the district, and make a separate rate for it all by itself. In *Soady* v. *Wilson* (2), where Somerset House was rated to a sewers rate, although it derived no benefit beyond the fact that the approaches and neighbouring streets were properly drained, the Court of Queen's Bench declined to interfere. But the judgment seems to have assumed that the rate should be according to the benefit. Lord Denman observed: "The case does not even state that the amount of rate does not bear a just proportion to the extent of benefit. This may possibly be immaterial; for if the commissioners have jurisdiction this Court would not inquire whether they had correctly exercised their judgment." In *Metropolitan Board of Works* v. *Vauxhall Bridge Co.* (3) Lord Campbell, in delivering the judgment of the Court, laid it down that "Primâ facie assessment under a sewers rate must have regard to the benefit which the property derives from the sewers." That opinion was, no doubt, extra-judicial, and upon that ground, in the later case of *Pew* v. *Metropolitan Board of Works* (4), the Court held

(1) (1724) 9 Mod. 94.
(2) (1835) 3 A. & E. 248.
(3) 7 E. & B. 964, at p. 982.
(4) (1865) 34 L. J. (M.C.) 97.

that they were not bound by it; but, though apparently dissenting from it, they refrained from expressly overruling it. All that they held was that the board were not bound to enter into an inquiry as to the amount of benefit derived by the different parochial divisions comprised within the sewerage district; they left it an open question whether the board might not have done so if they had liked.

*Robert Wallace, Q.C.*, and *F. E. Weatherly*, for the appellant. This is the only case in which it has ever been attempted to consider the particular benefit which each individual ratepayer derived from the sewage works. It is not suggested on the other side that there is any direct authority in support of such a principle: all that is said is that there is no direct authority against it. *Soady* v. *Wilson* (1) turned upon the kind of benefit which a party must derive in order to make him liable to a sewers rate; it had nothing to do with the question of the relative quantum of benefit derived by the different ratepayers. And the case has since been so explained in *St. Katharine Dock Co.* v. *Higgs*. (2) In *Reg.* v. *Head* (3) Crompton J., who had been a member of the Court which decided the *Vauxhall Bridge Case* (4), said in the course of argument, with reference to the doctrine there extra-judicially put forward: "I never had this point in my mind as far as I was a party to the judgment in that case; I was only present during the first part of the argument." He evidently repudiated the doctrine. And in *Griffiths* v. *Longdon Drainage Board* (5) Blackburn J. was of opinion that "the rate is to be levied upon those who are benefited by works according to the value of their properties."

*Foote, Q.C.*, in reply.

WRIGHT J. It seems to me that if the proposition for which Mr. Foote has contended in this case had been well founded in law it would have long ago found authoritative expression in decided cases. It is a proposition which would involve

(1) 3 A. & E. 248.
(2) (1847) 10 Q. B. 641, 647.
(3) (1863) 3 B. & S. 419, at p. 424.
(4) 7 E. & B. 964.
(5) (1871) L. R. 6 Q. B. 738.

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complicated inquiries in each case as to the relative extent of the benefit derived by one property as compared with another, and the difficulty of working out appeals against rates based on any such principle would be almost insuperable. There seems to be no satisfactory authority which distinctly supports the proposition. The only case which seems at all in favour of it is *Metropolitan Board of Works* v. *Vauxhall Bridge Co.* (1) But the opinion there expressed, although no doubt the opinion of judges who were great authorities on questions of this kind, was admittedly extra-judicial. And, for my own part, I venture to doubt whether the judges in that case meant to say more than that according to the established law only those lands could be rated to sewers rates which were benefited by the sewerage works. Further, that expression of opinion, besides being extra-judicial and ambiguous, has been observed upon in later cases. In *Reg.* v. *Head* (2) Crompton J. says that he was not a party to it; and Cockburn C.J. (3), after saying that the doctrine laid down in Callis on Sewers is "that property can only be assessed to a sewers rate if it derives benefit from the sewer," adds, "That doctrine was applied by this Court in *Metropolitan Board of Works* v. *Vauxhall Bridge Co.* (1), and I adopt all that was there said by Lord Campbell, which is in effect the doctrine laid down by Callis." There is certainly nothing to be found in Callis to the effect that the land is to be rated in proportion to the benefit. In *Pew* v. *Metropolitan Board of Works* (4) the Court understood the language of Lord Campbell in the *Vauxhall Bridge Case* (1) in the sense for which Mr. Foote contends, and they reluctantly expressed their dissent from it. They did not however expressly overrule it; it became unnecessary for them to do so, as they decided the case on other grounds. And in the later case of *Griffiths* v. *Longdon Drainage Board* (5) Blackburn J. expressed himself in terms which are inconsistent with Mr. Foote's contention, stating that the Sewers Act of Henry VIII. "has always received the construction that the

(1) 7 E. & B. 964.
(2) 3 B. & S. 419, at p. 424.
(3) 3 B. & S. 419, at p. 427.
(4) 34 L. J. (M.C.) 97.
(5) L. R. 6 Q. B. 738.

rate is to be levied upon those who are benefited by works according to the value of their properties," and as he was the judge who in *Pew's Case* (1) had delivered the judgment of the Court, the point now under discussion was presumably present to his mind. On consideration of the authorities, therefore, I come to the conclusion that Mr. Foote's contention fails.

There is one other matter to which I must refer, and that is the argument which was addressed to us upon s. 14 of the Sewers Act, 1833. I very much doubt whether it is competent for a drainage board under that section to select individual properties here and there—say those which stand fifty feet above the marsh—and constitute them a special drainage district, and for this reason, that it would be practically impossible to work out a levy and expenditure of moneys for sewerage purposes within so complicated and artificial a district. I think, therefore, that the decision of the quarter sessions must be affirmed.

DARLING J. I am of the same opinion. In giving this decision I think we are plainly deciding contrary to the expressed opinion of the Court in the *Vauxhall Bridge Case*. (2) I do not agree that that opinion is ambiguous. I think it means what Mr. Foote has contended for, and I am fortified in that view by the fact that Crompton J. upon its being cited before him in a later case understood it in that sense, and repudiated personal responsibility for it on the ground that he had not been present in court at the time when judgment was delivered. But that opinion is not binding on this Court, for it was admittedly extra-judicial. The same remark, however, applies to the observations of Blackburn J. in *Griffiths* v. *Longdon Drainage Board*. (3) They were unnecessary to the decision of the particular case, and therefore cannot be regarded as having disposed of the opinion in the *Vauxhall Bridge Case*. (2) What weighs with me is that the principle which I take it was laid down in the *Vauxhall Bridge Case* (2) was not commonly acted upon either before that time or since; and one

(1) 34 L. J. (M.C.) 97. (2) 7 E. & B. 964.
(3) L. R. 6 Q. B. 738.

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can well see that an endeavour to act upon it would be a matter of great difficulty, and would give rise to the greatest complications. If you are to rate land on the basis of the amount of benefit which the particular patch of land derives from the drainage, you would have to consider, among other things, what kind of crop was meant to be grown there.

*Order of quarter sessions affirmed.*

Solicitors for appellant: *Geare, Son & Pease, for Hill & Son, Langport.*

Solicitor for respondents: *H. Q. Louch, for Louch & Poole, Langport.*

J. F. C.

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C. A.

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*Feb.* 7.

[IN THE COURT OF APPEAL.]

## THE GUARDIANS OF DORKING UNION *v.* THE GUARDIANS OF ST. SAVIOUR'S UNION.

*Poor Law—Pauper—Birth Settlement—Division of Parish in which Pauper was born—Loss of Birth Settlement*—13 & 14 *Car.* 2, *c.* 12, *s.* 21—*Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 1, 3, 8—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 1 *sub-s.* 3, 67, 68, 75.

The decision in *Reg.* v. *Inhabitants of Tipton*, (1842) 3 Q. B. 215, as to the settlement of paupers, established the rule that the settlement in a parish gained by birth therein is a settlement in the parish as an entity, and not in any particular township of it, and if after a birth settlement has been gained in it the parish is divided by Act of Parliament into two or more separate parishes, so that it ceases to exist as one entire parish, the birth settlement gained in the old parish ceases to exist also.

This rule has been so long established and so frequently applied, that it cannot now be altered by the Court; and accordingly it was applied by the Court of Appeal, affirming the decision of Collins and Ridley JJ., in the case of a parish which had become two separate parishes by the operation of the Local Government Act, 1894, s. 1, sub-s. 3.

APPEAL from a Divisional Court (Collins and Ridley JJ.).

This was a special case stated under 12 & 13 Vict. c. 45, s. 11, by the Court of Quarter Sessions for the county of London, upon an appeal from an order of justices dated August 18, 1896, adjudging the settlement of one Albert Edward Bridger, a

pauper, to be in the parish of Dorking, Surrey, in the Dorking Union, and ordering his removal from the St. Saviour's Union, in the county of London, to the Dorking Union.

The appeal was heard at the quarter sessions for the county of London, when that Court allowed the appeal, and reversed the order, subject to the opinion of the Queen's Bench Division upon the case, which contained statements to the following effect:—

The pauper was born on December 26, 1879, at Westcott, a hamlet then forming part of the parish of Dorking, and in the Dorking Union, and he never acquired a settlement elsewhere.

In August, 1896, he became chargeable to the St. Saviour's Union, in the county of London; and on August 18, 1896, on the application of the guardians of that union, an order was made for his removal to the Dorking Union.

The Dorking Union appealed against that order.

At the time of the passing of the Local Government Act, 1894, the parish of Dorking was situate partly within, and partly without, the Dorking rural sanitary district.

By the operation of s. 1, sub-s. 3, of the Local Government Act, 1894, the part of the parish which was within the Dorking rural sanitary district, and the part which was without, were constituted and became two separate parishes, and the old parish of Dorking ceased to exist.

Under the powers given by s. 55, sub-s. 2, of the same Act, the county council of Surrey, on July 26, 1894, directed that the names of the two new parishes so formed should be "Dorking" and "Dorking Rural" respectively.

The hamlet or township of Westcott is situate in the parish of Dorking Rural, and is still within the Dorking Union.

Prior to and at the time of the passing of the Local Government Act, 1894, the old parish of Dorking had but one set of overseers, and one poor-rate was made and levied for the entire parish. Since the passing of that Act separate overseers have been appointed for each of the two new parishes of Dorking and Dorking Rural, and a separate poor-rate has been made and

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levied for each of these parishes; and from that time overseers have ceased to be appointed, and a poor-rate has ceased to be made for the old parish of Dorking.

It was contended by the guardians of Dorking Union—(1.) That, as the hamlet or township of Westcott was within the parish of Dorking Rural, and not within the parish of Dorking, the order of the justices was bad, inasmuch as the pauper, if settled at all in any parish of Dorking Union, was settled in the parish of Dorking Rural, and not, as adjudged by the justices, in the parish of Dorking; and that there being no evidence before the justices that the old parish of Dorking had been divided, and that the new parish of Dorking Rural had been formed and was in existence, the order on that and other grounds could not be amended by inserting the word "rural." (2.) That in consequence of the division of the old parish of Dorking, and the creation of the two separate parishes of Dorking and Dorking Rural in lieu of the old parish of Dorking, that old parish had been destroyed, and the pauper had lost his birth settlement, and that as there was not at the time of his birth any parish of Dorking Rural, he could not have any settlement in that parish now, not having acquired one since its formation.

As to the first contention, the Court of Quarter Sessions held that they could amend the order by adding the word "rural," and they accordingly so amended it.

As to the second contention, the Court held, upon the authority of *Reg.* v. *Inhabitants of Tipton* (1), *Reg.* v. *Inhabitants of Hunnington* (2), *Stourbridge Union* v. *Droitwich Union* (3), and *Reg.* v. *St. Martin's, New Sarum* (4), that the pauper had no settlement in the parish of Dorking Rural, and could not be removed to the Dorking Union in virtue of his birth settlement in the old parish of Dorking, that parish, for the purposes of settlement, having been destroyed, and the pauper's settlement gained in it by birth being wholly lost.

The special case came before the Divisional Court on July 30, 1897.

(1) 3 Q. B. 215.
(2) (1843) 5 Q. B. 273.
(3) (1871) L. R. 6 Q. B. 769.
(4) (1846) 9 Q. B. 241.

*Channell, Q.C.*, and *G. Elliott*, for the guardians of St. Saviour's Union.

*Bosanquet, Q.C.*, and *W. F. Barry*, for the guardians of Dorking Union.

The DIVISIONAL COURT held that they were bound by the principle of the cases above referred to, and affirmed the order of the quarter sessions.

From that decision the guardians of St. Saviour's Union now appealed.

*Macmorran, Q.C.*, and *G. Elliott*, for the appellants. The decision of the Divisional Court is wrong. It was held in *Reg.* v. *Tipton* (1) that where separate overseers were appointed for the different townships in a parish under 13 & 14 Car. 2, c. 12, s. 21, the birth settlement of the pauper in the old parish before its subdivision was lost, and the pauper had not a settlement in the particular township in which he was born. That case was followed in *Reg.* v. *Hunnington*. (2) *Reg.* v. *St. Martin's, New Sarum* (3), is the converse case, two parishes being united under a private Act, and it was held that a settlement gained in one parish was not destroyed by the union of the two parishes. The last case under the Statute of Charles II. is *Stourbridge Union* v. *Droitwich Union* (4), in which the Court followed the earlier decisions, but expressed strong disapproval of them. Those decisions should not be applied to a new statute passed for a totally different purpose. Sect. 1, sub-s. 3, of the Local Government Act, 1894, was passed for the purpose of dividing parishes for convenience of administration, and was not intended to affect poor law settlements. The decision under the Act of Charles II., which was passed for the purpose of dividing liabilities, should not be applied to the Local Government Act, 1894. Sect. 8 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), which is only partially repealed by the Local Government Act, 1894, makes provision for the

(1) 3 Q. B. 215.
(2) 5 Q. B. 273.
(3) 9 Q. B. 241.
(4) L. R. 6 Q. B. 769.

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adjustment of liabilities where a parish is divided, and ss. 67 and 68 of the Act of 1894 makes a similar provision; and the definition of "liabilities" in s. 100 of the Local Government Act, 1888 (which is made applicable by s. 75 of the Act of 1894), is very wide, and would include liability to maintain a pauper. The Act of 1894, therefore, contemplates that liabilities should not be abolished, but recognises the continuance of the liabilities and their adjustment as between the two new parishes. The pauper was, therefore, settled in the parish of Dorking Rural.

*Bosanquet, Q.C.*, and *W. F. Barry*, for the respondents, the guardians of Dorking Union. The question is whether the pauper is settled in the parish of Dorking Rural. The pauper acquired a settlement at the time of his birth in the old parish of Dorking, and he has never acquired any other settlement. The parish of Dorking Rural was not then in existence, and therefore he could not be said to have been born in that parish. A person can only be born once, and the pauper here was born in the old undivided parish of Dorking. The difficulty which the Courts felt with regard to s. 21 of 13 & 14 Car. 2, c. 12, was whether the parish was or was not divided by the operation of that Act. The Courts might have taken the view that the Act recognised the various townships constituting the parish as independent parishes which ought always to have maintained their own poor separately; and if the Courts had so held, then a settlement gained in one of the townships would have been a settlement in the parish of that township. The Courts, however, did not adopt that view of the statute, but adopted a narrower view, namely, that the parish was divided; and the doubts expressed by the Court in *Stourbridge Union* v. *Droitwich Union* (1) had regard to that decision. When once it was held that the parish was divided, then no difficulty arose, because the former entity was gone, and the settlement went with it. A pauper can only be removed to the parish where he was last legally settled. In this case that is the old parish of Dorking, which is now destroyed. Sect. 1, sub-s. 3, of the Local Government Act, 1894, does not give rise to any such difficulty as the

(1) L. R. 6 Q. B. 769.

Statute of Charles II. presented. It divides the parish in like manner as if it had been constituted a separate parish under the Divided Parishes Act of 1876; and s. 6 of this latter Act provides that a parish constituted under that Act shall be a parish for which an overseer shall be appointed, and for all other lay and civil purposes to which a parish may be liable or entitled. Therefore the old parish of Dorking is gone, and the pauper's birth settlement there has gone with it. As regards the question of adjusting liabilities, there are no liabilities in this case to adjust. The Act of 1894 has divided the old parish, and the liability has gone. Further, this is not a question of liability: it is a question of the status of a pauper, though incidentally the liability of a parish to maintain the pauper arises.

*Macmorran, Q.C.*, replied.

LINDLEY M.R. This case raises a nice point of law; but I do not see that we can differ from the judgment of the Court below, which I think is right. As regards the decision in *Reg.* v. *Tipton* (1), which has been followed in a great many cases, all I shall say is that it put a very narrow construction upon 13 & 14 Car. 2, c. 12. As I understand the law, it seems now to be established that a settlement gained by birth is a settlement gained in a parish, and not in any particular part of that parish; and if that parish is subdivided, the old parish ceases to exist, and the settlement goes with it. No settlement in the portion made into a new parish can be implied in favour of a person who had acquired a birth settlement in the old parish, which has passed away. The view has always been taken that if the Legislature meant the Statute of Charles II. to have had that operation, it would have said so. That being the case, there is nothing in the Local Government Act of 1894 which says so either. The inferences which might possibly be drawn from ss. 67 and 68 of that Act, purporting to deal with "transfer of property and debts and liabilities," and "adjustment of property and liabilities," really do not carry the case any further. They are not plain enough. When

(1) 3 Q. B. 215.

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this Local Government Act was passed, the Legislature knew perfectly well by the decisions to which I have been referring how the poor law stood, and how the law stood under the Divided Parishes and Poor Law Amendment Act, 1876; and yet nothing can be got out of any of the Acts to the effect that a person settled by birth in an old parish shall, when that parish is divided, be deemed to have a settlement in that part of the old parish in which he was born, and which is made into a new parish. Nothing of that kind is said. The consequence is that the appeal must be dismissed with costs.

RIGBY L.J. I am of the same opinion. In *Reg.* v. *Tipton* (1), which was before the Court in 1842, there was one rule laid down which, so far as I know, has never been departed from, that is to say, that in the case of a birth settlement the Court could not by construction create a different settlement from that which originally existed. In a settlement gained by birth it was a matter of absolute indifference in what part of a parish the birth had taken place. All that had to be shewn was that the pauper was born in the parish, and he then got a settlement in the parish. If that settlement had gone, none other could be supplied. Questions might very likely have been raised under the statute then under consideration which provided, not for the division of the parish, but for the setting up of the different townships in the parish as though they were independent poor law districts. It seems to have been thought that, whether the construction of the statute was right or wrong, time had established it. It appears to me that that part of the case has absolutely nothing to do with the present case.

It was pointed out in *Reg.* v. *Tipton* (1) that the result might be to destroy settlements. That was recognised and accepted as a result and, very possibly, not an unintentional result of the legislation. Whether that was a useful and laudable result, or one that ought to be deprecated and cured by legislation, is quite a different matter. It may be very much doubted whether in any Parliament subsequent to 1842 it would have

(1) 3 Q. B. 215.

been possible to get legislation which should extend the doctrine, not by any manner of means at that date universally approved of, of birth settlements. We know perfectly well that, at an earlier date even than that, the principle of the settlements law in the case of removing a pauper from one part of the country where he had friends and, presumably, opportunities at a future date of doing well for himself, to another where he would be stranded altogether and rendered a pauper for life, was very much questioned. However, from whatever motive, I see no ground to suppose that in any statute that has been referred to, or in any statute that I am aware of, that policy of doing what the Queen's Bench said in 1842 could not be done, namely, creating a fancy settlement as it were by relation, has ever been dealt with. At any rate, it is reasonably clear to my mind that the sections in the different Acts of Parliament which have been referred to have no relation to that matter.

Sects. 67 and 68 of the Act of 1894 were relied upon; and I think s. 68 was rightly put in the foreground; for I doubt whether under s. 67 the case arises at all. I do not lay it down, because it has not been very much discussed, but s. 67 appears to me to relate to the transfer of debts and liabilities from one authority to a new authority; while s. 68 undoubtedly deals with the relations of new authorities generally, and not merely with the case of transfer. But then the section only deals with debts and liabilities—taking away liabilities which are either liabilities of the two parishes together, or liabilities of one of them by reason of the separation, in respect of which it has some kind of equity to be relieved of, from the other. Now, if the doctrine which was laid down in 1842, and has not been questioned since, still holds good, there is no liability to adjust; the parish in which the pauper gained the birth settlement no longer exists. It is impossible to take him to the parish in which he was born, because there is none, and there is no liability, and nothing for s. 68 to take effect upon. In my opinion, therefore, the judgment of the Court below ought to be affirmed and the appeal dismissed.

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VAUGHAN WILLIAMS L.J. I am of the same opinion; but, speaking for myself, I cannot pretend at present quite to understand the judgments of the Court of Queen's Bench in the case of *Guardians of Stourbridge Union* v. *Guardians of Droitwich Union*. (1)

In that case Cockburn C.J. and Blackburn J. say in so many words that they think that the reasons which led the Court of Queen's Bench to decide as they did in *Reg.* v. *Tipton* (2), and which are set forth in the judgment of Lord Denman, were founded on mistake; and they say that they must not lightly overrule that authority, and so proceed to follow it.

I am not quite sure that I know why the Court of Queen's Bench in the days of Cockburn C.J. thought that the reasons given by Lord Denman, and upon which the decision in *Reg.* v. *Tipton* (2) was based, were founded on mistake. It seems to me to-day, at all events, that we are not only following the decision in *Reg.* v. *Tipton* (2) because it has been the established law for fifty years, but we are following the reasoning on which the decision was founded. I looked myself to try and see whether there was not some feature presented by the words of the 21st section of 13 & 14 Car. 2 to which Cockburn C.J. and Blackburn J. were referring when they said that the reasoning of *Reg.* v. *Tipton* (2) was founded on mistake, which we could find either in the statute of 1894 or in the principles of the statute of 1876, to which really the statute of 1894 throws one back. I say for myself that I am unable to find with any certainty what it was that Cockburn C.J. and Blackburn J. were referring to when they made those observations. I myself entirely agree with the reasoning in *Reg.* v. *Tipton* (2) in so far as it lays down that if any Act of Parliament is to be treated as abolishing an old parish and creating new parishes instead of it, then, unless there is some express enactment in the statute that the liabilities of the old parish shall be borne by the new parishes, it is not arguable that the Act can be treated as imposing upon the new parishes a liability, because it happened to be a liability which had to be borne by the

(1) L. R. 6 Q. B. 769. (2) 3 Q. B. 215.

old parish. According to my view of the matter, it could only be so treated if the true effect of the Act dividing the old parish and creating the two new parishes was to create the new parishes for purposes of administration only, and to continue the old parish as a poor law parish for the purpose of settlements and liabilities and the rest of it. But whether the Statute of Charles II. or that of 1894 is looked at, it is extremely difficult to take that view; and if that view is taken, it would almost look as if the proper order was that made by the justices in this case without any amendment at all. Because, if the old poor law parish continues to exist, so that you can say that the birth settlement gained in it has not gone, then it would seem that the proper thing would have been, to make the order upon that basis, and leave the two new parishes to adjust their liabilities under that order.

For myself, I concur; but I prefer to put my judgment upon the same ground that has been put in so many cases since *Reg.* v. *Tipton* (1), namely, that that decision binds us here; it has been law for so long, that I do not think we ought to alter it now.

*Appeal dismissed.*

Solicitors: *Langhams, for G. Scales, Dorking; Howard C. Jones.*

(1) 3 Q. B. 215.

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*Feb.* 3, 5, 8; *March* 11.

[IN THE COURT OF APPEAL.]

# ATTORNEY-GENERAL *v.* MAYOR, ALDERMEN, AND BURGESSES OF TYNEMOUTH.

*Municipal Corporation—Borough Fund—Appeal against Refusal of Licence—Payment of Costs of Chief Constable—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 140, *sub-ss.* 1–3, *ss.* 141–143, *Sched. V., Part II., clause* 5 (*d*)—*Municipal Corporations* (*Borough Funds*) *Act*, 1872 (35 & 36 *Vict. c.* 91), *s.* 2.

A municipal corporation cannot, where there is no surplus of the borough fund, legally pay thereout costs incurred by the chief constable in opposing by direction of the council appeals against the refusal of justices to renew the licences of publicans.

*Query*, whether, if there be a surplus, it can legally be applied to payment of such costs.

APPEAL from the judgment of a Divisional Court (Grantham and Wright JJ.), upon a special case stated in an action brought by the Attorney-General on the relation of the Newcastle Breweries, Limited, against the corporation of Tynemouth.

The claim was for a declaration that an agreement by the defendants to indemnify the chief constable of the borough against costs incurred by him in connection with certain appeals from the refusal of licensing justices to renew licences, and any payments in respect of such costs were ultra vires and illegal, and for an injunction to restrain the defendants from making any such payment.

In August, 1895, both the watch committee and the town council of the borough of Tynemouth passed resolutions authorizing the chief constable to obtain legal assistance and to attend the brewster sessions and to object to the renewal of the licences of certain publicans in the borough. This he did, and the result was that the renewal of these licences was refused. The publicans appealed to quarter sessions. Whilst the appeals were pending, at a meeting of the watch committee held on October 10 it was resolved that the council should not be asked to authorize the chief constable to appear as respondent in the appeals at quarter sessions, and that he should not be indem-

nified against the costs thereof, and that no permission should be granted to him to take witnesses to the sessions. On October 15 at a meeting of the town council it was resolved that the chief constable should be authorized to oppose the appeals, and should be indemnified against any costs which he might have to pay in connection with them. On October 18 the chief constable appeared at quarter sessions on the appeals with counsel specially retained from London, and with his witnesses, and opposed the appeals with the result that they were dismissed with costs, thereby incurring costs to the amount of 132*l.* 5*s.* above what could be obtained on taxation from the appellants. On November 19, a new watch committee having in the meantime come into office, it was resolved by the committee that the above-mentioned costs should be paid. It was intended accordingly to pay these costs out of the borough fund if it could be legally done. There was no surplus of the borough fund. The Divisional Court gave judgment for the relators.

*Asquith*, *Q.C.*, and *Macmorran*, *Q.C.*, for the defendants. By s. 140, sub-s. 1, of the Municipal Corporations Act, 1882, the borough fund is applicable to the several payments specified in the 5th schedule to the Act. Part II., clause 5, of that schedule specifies "the payments to be made under this Act to or in respect of the borough police, and to any special constable, including the following payments (namely): (*d*) all other charges and expenses which the watch committee, subject to the approbation of the council, direct to be paid for the purposes of the borough constabulary force." It is within the competence of the watch committee, who by s. 191 appoint the constables and who are responsible for the preservation of order in the borough, when the police take proceedings which are necessary for that purpose, to indemnify them against the costs of those proceedings. Such costs are expenses within Part II., clause 5, of the 5th schedule. The police have extensive powers and duties under the Licensing Acts, and notices of application for new licences or transfers must be served on the superintendent of police, so as to enable him to make inquiries and, if

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necessary, oppose the grant or transfer of a licence at brewster sessions. The superintendent must also attend at brewster sessions and answer questions. If these powers and duties are to be efficiently exercised and performed, it must sometimes be necessary for him to invoke legal assistance, and the watch committee can indemnify him against the expense so incurred. The chief constable had in this case opposed the renewal of the licences at brewster sessions by direction of the watch committee and the council, and it was within the scope of his duty to appear to oppose the appeals and, as counsel only can be heard at quarter sessions, to cause counsel to be retained; and the watch committee can direct that his expenses in so doing shall be paid.

Secondly, the costs in question are costs of legal proceedings necessary for the protection of the interests of the inhabitants of the district within the meaning of the Municipal Corporations (Borough Funds) Act, 1872 (35 & 36 Vict. c. 91), s. 2.

Thirdly, it is contended that the Municipal Corporations Act, 1882, s. 140, sub-s. 3 (*b*), authorizes any payment out of the borough fund by order of the council, subject to the safeguard provided by s. 141, sub-s. 2, which gives a discretionary power to the Queen's Bench Division on certiorari to disallow any order by the council for such payment.

Fourthly, the Court below decided the case solely upon the ground that the watch committee having before the sessions in October refused to authorize the chief constable to act as respondent in the appeal and to indemnify him against costs, it was not competent for the new watch committee in November to overrule the decision of their predecessors with regard to a matter that did not occur in their year of office. It is submitted that their decision in this respect was incorrect, and if, as already submitted, these costs were within Sched. V., Part II., clause 5 (*d*), it was competent for the new watch committee with the approbation of the council to direct them to be paid.

*Lawson Walton*, Q.C., and *T. Willes Chitty*, for the relators. It is impossible to bring these costs within any reasonable construction of the words "payments to or in respect of the

borough police" and "other charges and expenses for the purposes of the borough constabulary force" in Sched. V., Part II., clause 5.

The Municipal Corporations (Borough Funds) Act, 1872, s. 2, only applies to the costs of the prosecution of legal proceedings or the defence to legal proceedings by which the interests of the inhabitants are directly promoted or attacked.

Thirdly, it is impossible to suppose that the sweeping construction sought to be placed by the defendants upon s. 140, sub-s. 3 (*b*), and s. 141, sub-s. 2, of the Municipal Corporations Act, 1882, is correct. It would involve that the council might expend the borough fund on any matter however foreign to their functions under the Act, and the Queen's Bench Division might in their discretion sanction the expenditure. These provisions must have some limitation by reference to the other provisions of the Act, and it is submitted that the opposing of licensing appeals is altogether outside the scope of the functions of a municipal corporation.

It is submitted that the decision of the Divisional Court to the effect that the new watch committee could not overrule the decision of the watch committee for the preceding year was correct. The borough fund is principally made up of moneys levied in pursuance of the borough rate, and it is contrary to general principle that the watch committee should impose upon it charges in respect of a previous year which the watch committee for that year refused to sanction.

*Macmorran, Q.C.*, in reply.

[In the course of the argument the following cases were cited in addition to those referred to in the judgments: *Reg.* v. *Stamford Corporation* (1); *Reg.* v. *Exeter Corporation* (2); *Attorney-General* v. *Brecon Corporation.* (3)]

*Cur. adv. vult.*

March 11. A. L. SMITH L.J. read the following judgment:— This is an action by the Attorney-General at the relation of the Newcastle Breweries, Limited, against the mayor, aldermen,

(1) (1844) 13 L. J. (Q.B.) 177. (2) (1880) 6 Q. B. D. 135.
(3) (1878) 10 Ch. D. 204.

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and burgesses of the borough of Tynemouth, and the short but important question raised by the special case is whether the borough fund of that borough can be used by the town council for the purpose of opposing publicans seeking to obtain renewals of their licences.

The facts are these. In the month of August, 1895, the watch committee, as also the council of Tynemouth, authorized the chief constable of that borough to obtain legal assistance and attend the brewster sessions and object to the renewal of licences to certain publicans occupying houses in the borough.

This he did successfully, and the defeated publicans appealed to quarter sessions. Whilst the appeals were pending, at a meeting of the watch committee of the borough held upon October 10, 1895, it was resolved that the council of the borough should not be asked to authorize the chief constable to act as respondent in the licensing appeals then about to take place at quarter sessions, and that he should not be indemnified against the costs thereof, and that no permission should be granted to him to take his witnesses there.

Five days, however, after this resolution of the watch committee the council of the borough resolved the contrary, and that the chief constable should oppose the appeals, and that the council would indemnify him against costs.

Upon October 18, 1895, the chief constable appeared at quarter sessions by counsel specially retained from London and with his witnesses and opposed the appeals, and has thereby incurred costs to the amount of 132*l.* 5*s.* over and above what can be obtained upon taxation from the appellant publicans whom he defeated. So matters rested until the next month, by which time a new watch committee had come into office. This new watch committee, upon November 19, 1895, made an order directing the payment of the above-mentioned costs which had been incurred before they came into office. It is intended to pay these costs out of the borough fund if it can be legally done, and the question is whether it can be.

The borough fund of the borough of Tynemouth has no surplus.

These being the facts, I come to the four points raised, two

under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), one under the Borough Funds Act, 1872, and one upon which the Queen's Bench Division decided. I will, before dealing with these points, state what must first be considered.

Part IX. of the Act of 1882 comprises a group of sections which deals with the appointment of a watch committee and the powers they have over the police of the borough. It is headed, "Police. Watch Committee; Constables." It will be seen that s. 191 of this group has reference to the powers and duties of the watch committee in relation to the borough police, such as their appointment, supervision, dismissal, and making the force generally efficient.

The watch committee have nothing whatever to do with the carrying out of the licensing laws in their borough.

As regards the formation of the borough fund, s. 139 provides what payments are to be made into it so as to constitute the fund, and s. 144 provides for the making of a borough rate should the borough fund be insufficient "for the purposes to which it is applicable under this Act or otherwise by law." Sect. 140 is the section which deals with the application of this fund when formed.

By sub-s. 1 of this section it is enacted that the borough fund shall be applicable to and charged with the several payments specified in the 5th schedule. Sub-s. 2 of this section enacts that the payments specified in Part I. of this 5th schedule may be made without order of the council; those specified in Part II. may not be made without such order.

By sub-s. 3 it is enacted that no other payment shall be made out of the borough fund except under the authority of an Act of Parliament, or by order of the council, or by order of the court of quarter sessions for the borough, or by order of a justice in pursuance of this Act, or in cases in which the court of quarter sessions for a county or a justice of the peace might make an order for the payment of money on the treasurer of the county. Sect. 141 enacts that an order of the council for payment of money out of the borough fund shall be signed by three members of the council, and countersigned by the town clerk, and by sub-s. 2 any such order may be removed into the

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Queen's Bench Division and may be wholly or partly disallowed or confirmed with or without costs. Sect. 143 enacts: "If the borough fund is more than sufficient for the purposes to which it is applicable under this Act, or otherwise by law, the surplus thereof shall be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough."

I will return to these sections hereafter, and I pass on to the 5th schedule to see what payments under it the borough fund is to be applied to and charged with.

It is under this schedule that the first point is taken by the corporation, and it is said that it authorizes the payment of the costs in question out of the borough fund.

It is headed "Payments out of the Borough Fund." Part I. authorizes the payment out of the fund without order of the council of the remuneration of the mayor, recorder, town clerk, and other officers appointed by the council; moneys certified to be due to the treasury in respect of election expenses; and remuneration of assistant recorder. Part II. authorizes the payment out of the borough fund, but only upon the order of the council, of the following payments: (1.) expenses of overseers or town clerk in the enrolment of burgesses and holding municipal elections: (2.) the expenses of the town clerk in providing a court for election petitions: (3.) the expenses of providing and maintaining and improving the corporation buildings, including justices' room: (4.) fees payable to the clerk of the peace and to the borough coroner: (5.) the payments to be made under this Act to or in respect of the borough police, including the following payments, namely—(*a*) such salaries . . . . as the watch committee (here come in in this schedule the watch committee for the first time) with the approbation of the council may direct: (*b*) such further sum as may be awarded by the watch committee subject to the approbation of the council . . . . to a borough constable for extraordinary diligence . . . . or as compensation for wounds received by him in the performance of his duty, or as may be awarded by the watch committee subject to the approbation of the council as an allowance when disabled by bodily injury or worn out by

length of service: (*c*) extraordinary expenses which a borough constable appears to have necessarily incurred in apprehending offenders and executing the orders of any justice . . . . such expenses having been first examined and approved by that justice: (*d*) all other charges and expenses which the watch committee, subject to the approbation of the council, direct to be paid for the purposes of the borough constabulary force. This schedule is explicit as to what payments are to be made out of the borough fund.

It was argued for the corporation that sub-clause (*d*) of this schedule authorized the payment of the costs incurred in opposing publicans seeking to obtain renewal of their licences out of the borough fund. In my judgment it is out of all reason to attempt to strain the words "in respect of the borough police" "for the purposes of the borough constabulary force" into covering the costs of the counsel and witnesses of a litigant chief constable acting hostilely at quarter sessions to an appellant publican in a licensing appeal. Such a proceeding is not in respect of the borough police nor for the purposes of the borough constabulary at all; it is for the purpose of opposing a publican obtaining a renewal of his licence and nothing else, which is no part of the duty of a police constable nor of the watch committee nor of the council of a borough. A chief constable may well attend quarter sessions as a witness to give information if required, but it is no part of his duty to act as a litigant party thereat. I do not understand that the recent case in the House of Lords of *Boulter* v. *Kent Justices* (1) has any bearing upon this case. Blackburn J. in *Reg.* v. *Liverpool Corporation* (2), when dealing with s. 82 of the Municipal Corporation Act, 1835 (5 & 6 Will. 4, c. 76), which is a similar section to clause 5 of the 5th schedule, held that the last clause therein, which was similar to (*d*), was to be construed as referring to matters ejusdem generis with those previously mentioned, and was confined and is to be confined to acts affecting the constabulary force. In this I entirely agree; and I am clearly of opinion that no part of the 5th schedule, whether you take the words at the commencement or the end

(1) [1897] A. C. 556. (2) (1872) 41 L. J. (Q.B.) 175.

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of clause 5, authorizes the payment of these costs out of the borough fund, and that this point does not avail the corporation.

I now come to the next point which is taken upon the Borough Funds Act of 1872 (35 & 36 Vict. c. 91) by the corporation.

In the year 1871, in the case of *Reg.* v. *Sheffield Corporation* (1), upon a rule calling upon the council of the borough to shew cause why a writ of certiorari should not issue to bring up two orders of the council ordering payment of two sums out of the borough fund to be quashed, the Court of Queen's Bench held that under the provisions of the Municipal Corporation Act, 1835 (5 & 6 Will. 4, c. 76), s. 92, the borough fund could not be charged with the costs and expenses incurred by the council in opposing before justices certain regulations proposed by a water company which would impose onerous conditions upon the consumers, and in opposing a Bill in Parliament subsequently promoted by the company which was also detrimental to the interests of the inhabitants. It was sought by the corporation to justify the expenditure as being costs and expenses within, in the words of that Act, "all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act." It was, however, held by the Court that unless the borough fund had a surplus the borough fund could not be applied to the payment of these costs and expenses. It will be seen that these costs and expenses were incurred on behalf of the inhabitants of the borough, who were resisting onerous obligations being imposed upon them by a water company, and yet it was held that the borough fund could not be applied to these purposes under the terms of that Act.

In the next year, in consequence, as it appears to me, of this decision, the Borough Funds Act of 1872 was passed to authorize the application of funds of municipal corporations and other governing bodies in certain cases. Sect. 2 enacts that when in the judgment of a governing body it is expedient for such governing body to promote or oppose any local and personal Bills in Parliament, or to prosecute or defend any

(1) (1879) L. R. 6 Q. B. 652.

legal proceedings necessary for the promotion or protection of the interests of the inhabitants of the district, it shall be lawful for such governing body to apply the borough fund . . . . to the payment of the costs and expenses attending the same, provided that none of the powers therein contained shall apply where the promotion of or opposition to a Bill by a governing body has been decided by a Committee of either House of Parliament to be unreasonable or vexatious. In my judgment, this section means the taking of some legal proceeding by or on behalf of the inhabitants against some person or persons in order to promote the interest of the inhabitants, or the defending of some legal proceedings brought against the corporation or the inhabitants by some person or persons in order to protect the interest of the inhabitants. The intervention of a police constable as a respondent at quarter sessions in a licensing appeal is neither the one nor the other.

I now come to the point raised upon ss. 140–143 of the Act of 1882. What Blackburn J. said of the Municipal Corporation Act, 1835, in *Reg.* v. *Sheffield Corporation* (1), which was the precursor of the Act of 1882, is, in my judgment, applicable to the Act of 1882 which we are now considering. He said: "Before that Act (1835) municipal corporations were owners of estates, and they might spend the estates subject to very little control; and in point of fact there was great jobbery and great waste of the estates; and one very great object of the Municipal Corporation Act was to restrain the town council."

It is argued that sub-s. 3 (*b*) of s. 140, taken in conjunction with s. 141, sub-s. 2, authorizes a payment out of the borough fund whenever there is "an order of the council," subject only to a liability of the order being disallowed in whole or in part by the Queen's Bench Division. The words of sub-s. 3, coupled with clause (*b*), which are relied on are these: "No other payment shall be made out of the borough fund except by order of the council"; and it is said that these words mean, if there be an order of the council for the payment of money out of the borough fund, that is sufficient to authorize a payment out of

(1) L. R. 6 Q. B. 652, at p. 661.

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that fund, subject only to an intervention by the Queen's Bench Division. It is clear to me that this sub-s. (*b*) must have some limitation. It cannot mean to authorize any payment the council may order. That would be absurd. Then, what is the limitation? It is said that the sole limitation is the control of the Queen's Bench Division given by s. 141, sub-s. 2. I do not read these sections so. Can it be said that the words of s. 140, sub-s. 3 (*c*), "by order of the court of quarter sessions for the borough," or (*d*) "by order of a justice in pursuance of this Act," mean that any order of quarter sessions or of a justice, directing payment out of the borough fund, would authorize a payment out of the fund, even though they were orders for payment for purposes other than those authorized by the Act or otherwise by law? These last words, "or otherwise by law," are new in the Act of 1882, and appear to me to have reference to the Borough Funds Act of 1872, for without them the provisions of this Act of 1872 would be excluded from the Act of 1882, if the words "applicable under this Act" stood alone. It cannot be said that as to these orders of quarter sessions or of justices, s. 141, sub-s. 2, applies, for it obviously does not, and therefore there is no such limit as is suggested of the controlling power of the Queen's Bench Division applicable as to them. Then what is the limit as to the making of orders by the council, by quarter sessions, and by justices? I can find none other than that orders can only be made for those purposes for which by the Act of 1882 and the Act of 1872 the borough fund may be applied. I can in these Acts find no pretence for saying that the borough fund is to be applied for opposing publicans who are appellants at quarter sessions. I think that the true reading of s. 140, coupled as it must be with ss. 141, 142, and 143, is, that until the borough fund has discharged the several purposes for which by the Acts of 1882 and 1872 it is applicable, the borough fund cannot be resorted to by the council to pay thereout for matters outside those purposes, but should the borough fund be more than sufficient for the purposes to which by that Act and the Borough Funds Act of 1872 it is made applicable, then the surplus, if any, may be applied under the direction of the council for the

public benefit of the inhabitants and improvement of the borough.

This surplus is called by Lord Herschell a chance or accidental surplus in *Attorney-General* v. *Newcastle-on-Tyne Corporation*. (1)

The above is my reading of the Act of 1882.

We have nothing in this case to do with the Act of 1837 (7 Will. 4 and 1 Vict. c. 78), s. 44 (an Act to amend the Act of 1835), in which, as was pointed out in *Reg.* v. *Prest* (2), followed by *Reg.* v. *Mayor of Norwich* (3), a special discretion was given to the Court of Queen's Bench when determining whether there had been a misapplication of the borough fund.

In my judgment s. 141, sub-s. 2, was inserted as to "orders of the council," not for the purpose of giving the council power to order payments out of the borough fund for purposes not within the Act or otherwise authorized by law, but was inserted to give the Queen's Bench Division plenary power over every order of the council under whatever circumstances made, and that s. 141 has not the effect now suggested, namely, to form the sole and only limitation to the power of the council making orders for payment of money out of the borough fund.

In my judgment the sections are restraining and not enabling sections as regards the powers of the council.

I do not wish to be understood that, if there were a surplus, these costs would come within the words "for the public benefit of the inhabitants and improvement of the borough"; but this point I have not to decide in this case.

For the reasons above I am of opinion that neither under the 5th schedule nor under the Borough Funds Act, 1872, nor under ss. 140–143 of the Act of 1882, can these costs be legally paid out of the borough fund.

I now come to the fourth and last point. The learned judges in the Court below did not deal with the construction of the Municipal Corporations Act, 1882, nor with the Borough Funds Act, for this Act was not even mentioned to them. They determined the case upon the ground that the new watch

(1) [1892] A. C. 568, at p. 575. (2) (1850) 16 Q. B. 32.
(3) (1882) 30 W. R. 752.

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committee had no jurisdiction to overrule what had been done by their predecessors in office and make the order they did upon November 19, 1895.

I am not satisfied as to this; but, as I determine this case adversely to the corporation upon the main points, although the learned judges in the Court below decided it upon a different ground also adversely to the corporation, the judgment of the Court below must be affirmed; and this appeal therefore will be dismissed with costs.

CHITTY L.J. read the following judgment:—On the appeals to the court of quarter sessions from the refusal by the licensing justices to grant renewals of licences, the chief constable of the borough appeared by counsel as respondent, and obtained an order for payment of his costs by the appellants. On the taxation of costs as between the parties to the appeal, his costs for fees paid to counsel amounting to 132*l.* 5*s.* were disallowed. The question before us, which is one of some importance, is whether the borough fund can be lawfully applied in paying these disallowed costs. Put in a more general form, the question is whether the borough fund can lawfully be applied in indemnifying the chief constable against costs incurred by him as a litigant party appearing by counsel on an appeal to quarter sessions. It appears to be the practice, and it seems quite right and proper, that the chief constable should attend in person at the quarter sessions on the hearing of licensing appeals. He does so for the purpose of affording such information as the Court may require. But it is clear that it forms no part of his duty as chief constable to appear by counsel as a litigant party on the appeal. There appears to exist in this borough, as in many others, a difference of opinion on the policy of granting or refusing licences by way of renewal or otherwise. This is shewn by the various and conflicting resolutions passed by the watch committee. Notably, in October, 1895, the watch committee refused the chief constable's application for the indemnity; but in the following November, after the election had taken place, their successors passed a resolution in favour of the payment of the disallowed costs. This Court

cannot enter into the consideration of any such question of policy, or of the merits of either side in a controversy of this kind. The question is one of law, and must be decided without regard to the circumstance whether the chief constable appeared to support or oppose the publicans on the appeal.

The first point raised by the appellants turned on the powers and duties of the watch committee. They are to be found in s. 190 and the succeeding sections, forming Part IX. of the Municipal Corporations Act, 1882, and in the 5th section of Part II. of Sched. V. to the Act. These provisions have already been fully stated by the Lord Justice. The principal argument on this head was founded on sub-s. (*d*) of that 5th section, where the words are, "all other charges and expenses which the watch committee, subject to the approbation of the council, direct to be paid for the purposes of the borough constabulary force." The watch committee, as already stated, by their resolution of November, 1895, directed payment of the 132*l.* 5*s.*, and the council had previously in October of the same year passed a resolution in favour of the indemnity, although they have not made a direct order for the payment. In my judgment sub-s. (*d*) does not authorize the payment. It must be construed in the usual way by considering the payments specially authorized, and confining the payments under the general words to payments of the same class as those specifically mentioned. In my opinion the proposed payment is not a payment of a charge or expense for the purposes of the constabulary force. To hold that it was would be an unjustifiable straining of the words.

The second point raised on behalf of the appellants appears not to have been mentioned in the Divisional Court. It was founded on clause (*b*) of sub-s. 3 of the 140th section of the Municipal Corporations Act, 1882. The section enacts that the borough fund shall be applicable to and charged with the several payments specified in the 5th schedule, and that the payments specified in Part I. of that schedule (consisting of the remuneration of the mayor and the recorder, and the salaries of the town clerk and other officers of the corporation) may be made without order of the council, but that those

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specified in Part II. may not be made without such order. The section then proceeds to enact that no other payment shall be made out of the borough fund except in the five cases specified, among which is clause (*b*), "by order of the council." Read by itself this clause would purport to confer on the council an unlimited power to order any payment they might think fit. But the context in the same section tends to shew that it cannot be so read. The 141st section clearly confers on the Queen's Bench Division a power to check and control orders of the council for payment. Any such order may be removed by certiorari, and may be wholly or partially disallowed or confirmed according to the judgment and discretion of the Court. This controlling power extends to both sets of orders for payment, namely, to those under sub-s. 2 as well as those under sub-s. 3, clause (*b*). Thus far we seem to arrive at the position that the council have a general power to make orders for payment without any express limitation, and that the Queen's Bench Division have a general discretionary power of disallowing the order without any express limitation, and without any express rule being laid down by the Legislature for the guidance of the Court in the exercise of their controlling power. It is a judicial discretion to be exercised as all judicial discretions must be. But we cannot stop at this point; there remain for consideration the important provisions relating to the surplus of the borough fund. These are contained in the 143rd section. Dealt with strictly and logically, the surplus means that which remains after satisfying the previous provisions, including clause (*b*), in the 140th section. The 143rd section is divided into two parts: the first is where "the borough fund is more than sufficient for the purposes to which it is applicable under this Act or otherwise by law": in that case "the surplus thereof shall be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough." The second part is where "the surplus arises from the rents and profits of the property of the municipal corporation and not from a borough rate, and the borough is a sanitary district under the Public Health Act, 1875." In that case the corporation may apply the surplus in payment of any expenses

incurred by them as such sanitary authority, before or after the commencement of the Act, in improving the borough by drainage, enlargement of streets, or otherwise under the Public Health Act, 1875, or any Act thereby repealed. The provisions of the 143rd section are specific. Read reasonably, as they must be, they import that under the prior provisions of the 140th and 141st sections the borough fund is not applicable to the specific purposes of the 143rd section, and they place a limit on clause (*b*), and afford some guidance to the Court in the exercise of their controlling power. No construction of the three sections is permissible which results in striking out clause (*b*). Some effect must be given to it. It has some limits, not defined by the Legislature. It appears to me that it is not the function of the Court to attempt any precise definition where the Legislature has refrained from defining. Still some interpretation must be given: some limit is clearly imposed on clause (*b*). I find it less difficult to say what cannot be lawfully done under clause (*b*) than what can be done lawfully. The best interpretation that I can give, necessarily somewhat vague, is that in construing clause (*b*) regard must be had to the general scope of the Act, to the purposes for which the borough fund as regulated by the Act is constituted, and to the legitimate functions of a municipal corporation. In this connection there are two material observations to be made. The borough fund is made up by bringing into it the income of the corporate property and of the fines mentioned in s. 139, and the money levied on the ratepayers under s. 144. In the case of the newer corporations which possess but little corporate property the fund is substantially made up by the rates. The rate is leviable only in the case of the borough fund being "insufficient for the purposes to which it is applicable under this Act or otherwise by law." The other observation is that the provisions of the Borough Funds Act, 1872, which enlarged the powers over the borough fund, are preserved by clause (*a*) of the 3rd sub-section of s. 140 of the Act of 1882. The group of ss. 139 to 143 inclusive is not a mere re-enactment of s. 92 of the repealed Act of 1835 and the intermediate amending Acts. The preamble of the Act of 1882 recites that, the Act of

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1835 having been from time to time much altered and added to by other Acts, it is expedient that all the Acts be reduced into one Act with some amendments. The 92nd section allowed payment out of the borough fund "of all other expenses not herein otherwise provided for which shall be necessarily incurred in carrying into effect the provisions of this Act." The stringency of this enactment found in the words "necessarily incurred" had been the subject of judicial decision. The stringency had been relaxed by subsequent Act of Parliament. The words quoted are not repeated in the Act of 1882. To some extent they are replaced by clause (*b*).

Having now examined and discussed the Act of 1882, I state the conclusion at which I have arrived. In my judgment the borough fund cannot be lawfully applied in making the payment intended. It is contrary to the scope of the Act and the purposes for which the fund exists. It forms no part of the functions or duty of the municipal corporation as such to embark in litigation through the chief constable in licensing appeals of this kind. A decision in favour of the payment would be fraught with serious consequences to the ratepayers, by whose contributions the fund is confessedly made up. If the payment were allowed, it would be difficult to escape from the conclusion that a similar payment would be permissible if the council supported, instead of opposing, the side of the publicans in such a controversy and litigation as that which has occurred at quarter sessions.

Our attention was called to *Attorney-General* v. *Blackburn Corporation*. (1) The case was heard on a motion day, and no final decision was given on clause (*b*). The evidence did not shew satisfactorily that the corporation threatened or intended to apply the borough fund in paying the expenses of celebrating Her Majesty's Jubilee in the borough. The resolution passed by the council was carefully framed. It purported to be for a payment by way of remuneration to the mayor for his expenses during the year, including the proper celebration of the Jubilee. Remuneration to the mayor is within the express authority of the Act. The resolution went on to state

(1) (1887) 57 L. T. (N.S.) 385.

that no payment should be made out of the borough fund except in so far as such payment was authorized by law. I was not then satisfied, nor am I now convinced, that such a payment would be contrary to law. But it is not necessary to the decision in this case to give a final opinion on the point, and I refrain from so doing.

I agree with the judgment of the Lord Justice on the Borough Funds Act, 1872, and have nothing to add to what he has said.

The decision of the Divisional Court turned on the minor point whether it was competent for the watch committee in November to reverse the resolution of its predecessors in office come to in the previous October. We have thought it right to decide the main and more important question. Seeing that the time for making the payment (if it could lawfully be made) had not arrived when the chief constable made his application for indemnity to the committee in October, I am not satisfied that the committee in November was precluded from directing the payment simply by reason of the resolution of October. But, as we decide the main question, this point becomes immaterial, and I say no more about it.

I agree that the appeal must be dismissed.

COLLINS L.J. concurred.

*Appeal dismissed.*

Solicitors for relators: *Paterson, Snow & Co., for Ranson, Nelson & Mesnard, Sunderland.*

Solicitors for defendants: *Sharpe, Parker & Co., for Adamson & Adamson, Tynemouth.*

E. L.

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*March* 17.

[IN THE COURT OF APPEAL.]

## BUCKWELL *v.* NORMAN.

*Bankruptcy—"Debt provable in Bankruptcy"—Debt incurred after Notice to Creditor of Act of Bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 37.

Where a debt has been incurred by a bankrupt before the date of the receiving order, but after notice to the creditor of an act of bankruptcy available against the debtor, an action for the debt cannot be maintained, it being a debt provable in bankruptcy within the meaning of the Bankruptcy Act, 1883, s. 37, sub-s. 3, although by sub-s. 2 of that section the creditor is subject to a personal disqualification for proving it.

APPEAL from the judgment of a Divisional Court (Wright and Kennedy JJ.), affirming the judgment of the judge of the Brighton County Court as after mentioned.

The action was by a solicitor for the amount of a bill of costs incurred by the defendant under the following circumstances. The defendant, who already owed the plaintiff a bill for costs, informed the plaintiff that he could not pay his debts, and requested the plaintiff to present a petition in bankruptcy for him, which the plaintiff accordingly did. A receiving order was made, and the defendant was subsequently adjudicated a bankrupt. The costs sued for were the plaintiff's costs in respect of the presenting of the defendant's petition in bankruptcy, which were incurred prior to the date of the receiving order. The county court judge held that the action could not be maintained. On appeal, the Divisional Court affirmed his judgment. (1)

(1) Bankruptcy Act, 1883, s. 9: "(1.) On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court, and on such terms as the Court may impose."

Sect. 37: "(1.) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract,

*Firminger* (*E. Bowen Rowlands* with him), for the plaintiff. In this case the plaintiff had notice of an act of bankruptcy by the defendant under s. 4, sub-s. 1 (*h*), of the Bankruptcy Act, 1883, when the debt was contracted. Therefore, by reason of the provisions of s. 37, sub-s. 2, he could not prove the debt in the bankruptcy. The protection given to the debtor against an action by s. 9, sub-s. 1, is only in respect of debts provable in bankruptcy. The debt in question not being a provable debt, an action was maintainable in respect of it. [He referred also to the Bankruptcy Act, 1883, s. 30, sub-ss. 1, 2, 3.]

*E. T. Holloway*, for the defendant. The defendant is protected from an action in respect of this debt by s. 9, sub-s. 1, of the Bankruptcy Act, 1883. The debt sued for is a debt provable in bankruptcy within the meaning of the Act, although the plaintiff was personally incapacitated from proving it by reason of his having had notice of an act of bankruptcy when it was incurred. Sect. 37, sub-s. 3, provides that, save as aforesaid, all debts incurred before the date of the receiving order shall be debts provable in bankruptcy. Sub-s. 2 of the same section does not say that, where it applies, the debt shall not be provable in bankruptcy, but that the person who had notice of the act of bankruptcy shall not prove it.

*Firminger*, in reply. A debt which cannot be proved cannot be a provable debt.

A. L. SMITH L.J. This is an appeal from the judgment of a Divisional Court affirming the decision of a county court

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promise, or breach of trust, shall not be provable in bankruptcy. (2.) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice. (3.) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy."

Sect. 168: "(1.) In this Act, unless the context otherwise requires . . . . 'debt provable in bankruptcy,' or 'provable debt' includes any debt or liability by this Act made provable in bankruptcy."

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judge in favour of the defendant in an action by a solicitor for costs. The costs in question were incurred between the act of bankruptcy and the date of the receiving order against the defendant. The plaintiff had notice of the act of bankruptcy, which was under s. 4, sub-s. 1 (*h*), of the Bankruptcy Act, 1883, at the time when the costs were incurred. The question whether the action is maintainable depends upon whether the debt sued for was a debt provable in bankruptcy within the meaning of the Bankruptcy Act, 1883. I am of opinion that upon the true construction of the Act it was such a debt. Sect. 37, sub-s. 3, provides that "save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy." This was a debt to which the debtor was subject at the date of the receiving order, and therefore comes within the class of debts provable in bankruptcy. Sub-s. 1 of s. 37 provides that demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy. Sub-s. 2 of s. 37 casts upon a person who had notice of an act of bankruptcy available against the debtor an incapacity for proving in the bankruptcy any debt or liability contracted by the debtor subsequently to the date of his so having notice. The effect of the sub-sections taken together is in my opinion that a debt may be provable in bankruptcy within the meaning of sub-s. 3, though there may be a personal incapacity to prove it under sub-s. 2. On this ground I think that the judgment of the county court judge was correct. It was pointed out during the argument that the result of the opposite construction of the Act would be that, if a person with notice of an act of bankruptcy committed by the debtor lends him 1000*l.*, the debt not being a provable debt within the Act, he can, after the debtor's estate has been administered in bankruptcy, and the debtor has obtained his discharge, come forward and claim the whole amount of his debt from the debtor. I do not believe that result would be in accordance with the intention

of the Legislature. For these reasons I think the appeal must be dismissed.

CHITTY L.J. I agree. It seems at first sight a strange proposition that there can be a debt provable in bankruptcy which cannot be proved; but I nevertheless think that such is the true construction of the Act, having regard not only to the particular words used in s. 37, but also to the other provisions of the Act. By s. 168 of the Act "debt provable in bankruptcy" is interpreted as including "any debt or liability by this Act made provable in bankruptcy," subject to the usual qualification, "unless the context otherwise requires," which, however, has no application in this case. Turning to s. 37, and reading first sub-s. 3 of that section, we find it provided that, save as aforesaid, all debts and liabilities to which the debtor is subject at the date of the receiving order shall be deemed to be debts provable in bankruptcy. The debt claimed in this action was a debt to which the debtor was subject at the date of the receiving order. Having ascertained what kind of debts are provable in bankruptcy, I turn back to sub-s. 2. That sub-section makes, as it appears to me, a personal exception in the case of a person who had notice of an act of bankruptcy when the debt was incurred. The language used by the sub-section is remarkable. It does not say that in that case the debt shall not be provable in bankruptcy, but that the person "shall not prove." The result appears to me to be that the debt in question is a "provable debt," but there is a personal exception made by the Act which prevents the particular creditor from proving that which is in its nature a provable debt. The Act distinguishes between the quality of the debt itself which is provable, and the personal incapacity which prevents the particular creditor from proving it. It appears to me that the other provisions of the Act support the view I take of s. 37. If we did not adopt this construction of the section, the extraordinary result would follow that in some cases a person who had notice of an act of bankruptcy when the bankrupt incurred a liability to him might be in a better position afterwards than if he had not had such notice.

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COLLINS L.J. I am of the same opinion. In order that a debt may be proved in bankruptcy, two things must concur. There must be a provable debt, and the person who seeks to prove it must not be under a personal incapacity for doing so. It seems to me clear that the construction which we are adopting is the true meaning of the Act. The question whether the debt in the particular case may or may not be proved no doubt depends on whether the creditor had or had not notice of an act of bankruptcy when the debt was incurred. But the existence of such notice cannot alter the quality of the debt itself, which is provable. There is merely a personal incapacity for proving the debt which arises from the fact of the creditor having had notice of an act of bankruptcy. This view not only makes the whole matter simple, and gets rid of the anomaly pointed out by my Lord, but it also appears to me to be in accordance with the natural meaning of the words of s. 37 of the Act.

*Appeal dismissed.*

Solicitors for plaintiff: *C. R. Sawyer & Ellis, for J. C. Buckwell, Brighton.*

Solicitor for defendant: *R. Hewlett, for A. Mirams, Brighton.*

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## *In re* PIERS.
## *Ex parte* PIERS.

*Bankruptcy—Secured Creditor—Omission to value Security—Inadvertence—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Sched. I., rule* 10; *Sched. II., rules* 11, 12, 13.

A secured creditor of a bankrupt who mentions his security in his proof, and states that it is worthless, does not omit to value his security within the meaning of the Bankruptcy Act, 1883, Sched. I., rule 10:—

So *held* by the Court of Appeal (A. L. Smith L.J. and Chitty L.J., Collins L.J. doubting).

Where a creditor omits to value his security by reason of erroneous information leading him to suppose it to be worthless, there is not an omission to value the security which arises from inadvertence within the meaning of the Bankruptcy Act, 1883, Sched. I., rule 10.

APPEAL from the judgment of Wright J. sitting in bankruptcy.

In October, 1890, a receiving order was made against Sir Eustace Piers who was subsequently adjudicated a bankrupt. In October, 1891, one Turnbull sent in a proof against the estate as a creditor which, so far as material, was in the following terms: "The said Sir Eustace Piers was at the date of the receiving order, namely, October 1, 1890, and still is justly and truly indebted to Thomas Turnbull in the sum of 494*l.* 5*s.* for professional services rendered, work done, and fees payable by the said Thomas Turnbull as solicitor for and on behalf of the above-named bankrupt at his request, for which sum I say that I have not received any manner of satisfaction or security whatsoever, save and except a charge upon certain debentures which is considered worthless." It appeared that Turnbull had taken from the bankrupt by way of security for his debt a third mortgage of certain debentures of a company, the first mortgagee of them being one Read, the respondent in the appeal, and the second mortgagee being one Eley. In March, 1890, Read had appointed a receiver under the terms of his mortgage. He was examined in the bankruptcy and stated

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that the amount which he had received under his mortgage was not sufficient to satisfy his debt, and that a balance was still due to him from the bankrupt. This statement came to the knowledge of Turnbull, who appeared to have in consequence supposed that his security was worthless. In March, 1892, he voted in respect of his whole debt at a meeting of creditors. Eley, the second mortgagee of the debentures, subsequently brought an action against Read for an account of the amount received by him under his mortgage, and this action was referred to an official referee with the result that in 1896 a judgment was given from which it appeared that Read had been overpaid to a large amount. In March, 1896, Turnbull assigned his debt and the security for it, if any, to C. P. Piers, the son of the bankrupt, who was the appellant in the appeal, for the sum of 30*l.* paid down and a covenant to pay 20*l.* more. In 1897 C. P. Piers applied to the registrar in bankruptcy ex parte for leave to amend the proof by altering the valuation of the security from nil to the full amount of the debt under the Bankruptcy Act, 1883, Sched. II., rule 13. The registrar granted the application. Subsequently the respondent, Read, who was a creditor in the bankruptcy in respect of other debts than that in respect of which he held the before-mentioned mortgage, applied to the registrar to set his order aside, which he did without prejudice to any application which the appellant might make to the judge in bankruptcy under the Bankruptcy Act, 1883, Sched. I., rule 10. The appellant thereupon applied to the judge to be allowed to amend the proof by valuing the security at the full value of the debt. The learned judge refused the application. (1)

(1) Bankruptcy Act, 1883, Sched. I., rule 10: "For the purpose of voting a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt, he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence."

Sched. II., rule 11: "If a secured creditor does not either realize or surrender his security, he shall, before ranking for dividend, state in his proof

March 4. *McIntyre*, for the appellant. There was in this case an omission to value the security through inadvertence. Turnbull was induced by the erroneous statement of the respondent, which he hastily and incautiously assumed to be correct, to suppose that his security was worthless. The meaning of the term "inadvertence" is not confined to accident or mistake. It may apply to an act deliberately done, if incautiously done without sufficient inquiry. "Inadvertence" may consist in too readily accepting a statement made without sufficient investigation. [He cited *Ex parte Clarke* (1); *In re Lister & Co.* (2)]

*Cozens-Hardy*, Q.C., and *E. A. Nepean*, for the respondent. There was not in this case an omission to value the security within the meaning of Sched. I., rule 10. Turnbull did estimate the value of his security, and valued it as worthless.

Secondly, if there was an omission to value the security, it did not arise from inadvertence. A creditor who omits to value his security because of erroneous information or mistake of fact does not omit to value it through inadvertence.

*McIntyre*, in reply. The proof put in by Turnbull does not amount to a valuation of the security. No particulars of the security are given. It is merely mentioned, but no value is put upon it. The valuation contemplated by Sched. I., rule 10, is an assessment at some positive amount. That is shewn by Sched. II., rules 11–14.

*Cur. adv. vult.*

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the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to receive a dividend only in respect of the balance due to him after deducting the value so assessed."

Rule 12 (*a*): "Where a security is so valued, the trustee may at any time redeem it on payment to the creditor of the assessed value."

Rule 13: "Where a creditor has so valued his security, he may at any time amend the valuation and proof on shewing to the satisfaction of the trustee, or the Court, that the valuation and proof were made bonâ fide on a mistaken estimate or that the security has diminished or increased in value since its previous valuation; but every such amendment shall be made at the cost of the creditor, and upon such terms as the Court shall order, unless the trustee shall allow the amendment without application to the Court."

(1) (1892) 40 W. R. 608.

(2) [1892] 2 Ch. 417.

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March 18. A. L. SMITH L.J. read the following judgment:— The question raised upon this appeal is whether Mr. Turnbull, who was a creditor of Sir Eustace Piers, a bankrupt, has omitted to value his security, and such omission has arisen from inadvertence within the meaning of rule 10 of Sched. I. of the Bankruptcy Act, 1883. Wright J. decided against Mr. Turnbull's assignee, Mr. Piers, who appeals. Rule 10 is as follows: "For the purpose of voting a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security, the date when it was given, and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security, unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence." Sir Eustace Piers was adjudicated a bankrupt upon October 1, 1890, and Mr. Turnbull, upon October 3, 1891, sent in his proof against the estate, which, so far as material, was as follows: "The said Sir Eustace Piers was at the date of the receiving order, namely, October 1, 1890, and still is justly and truly indebted to Thomas Turnbull in the sum of 494*l.* 5*s.* for professional services rendered, work done, and fees payable by the said Thomas Turnbull as solicitor for and on behalf of the above-named bankrupt at his request, for which sum I say that I have not received any manner of satisfaction or security whatsoever, save and except a charge upon certain debentures which is considered worthless." Having thus sent in his proof, Mr. Turnbull in March, 1892, voted at a meeting of creditors in respect of his whole debt of 494*l.* 5*s.* Mr. Turnbull's assignee in the year 1897 for the first time contended that, when Mr. Turnbull sent in his proof upon October 3, 1891, he omitted to value his security, and that this arose from inadvertence. Now, pausing here, can it be truly said that Mr. Turnbull, when he sent in his proof upon October 3, 1891, omitted to value his security? It seems to me that he did not, for he then deliberately elected to assess the value of his security as being worthless, and to prove against the estate of Sir Eustace

Piers in respect of his whole debt, and having done so proceeded to vote at a meeting of creditors as being a creditor against the estate for the whole amount of his debt. It appears to me that he then omitted nothing. He assessed the value of his security at what he then believed to be its value—i.e., as worthless. Assessing the value of a security as worthless is equally an assessment as if the assessment had been of some value. This, in my opinion, suffices to determine the present case against the appellant.

But assuming that Mr. Turnbull had omitted to value his security, which I think he had not, did he do so by inadvertence? What is said is this: that Mr. Turnbull was induced in October, 1891, to assess the value of his security as being worthless by information which led him to believe that it was so, but that by reason of a litigation which has taken place in subsequent years it has been found out that his security is not worthless, and in 1897 the appellant sought to amend the proof by valuing his security at 494*l.*, and to adhere thereto rather than to prove, as had been done, against the estate for his debt. The finding out by subsequent events that in October, 1891, Mr. Turnbull was in error in electing to assess as worthless his security is not, in my opinion, "inadvertence" within the meaning of the rule. This word points to forgetfulness or accident, and not, as Vaughan Williams J. well puts it in *Ex parte Clarke* (1), to the case of a creditor having the choice before him of what he will do and balancing the advantages and deliberately electing to prove and abandon his security. I agree with Wright J. that the word "inadvertence" in this rule means the opposite of deliberate election, and that it does not cover a deliberate election, though based upon false grounds. What Mr. Turnbull did in October, 1891, did not arise either from forgetfulness or accident, though it may have been a mistake. But this is not the word in the rule, and when I see that in rule 13, Sched. II., the Legislature has used the words "mistaken estimate," it shews me that it meant by "inadvertence" something other than a mistake. If North J., in the case of *In re Lister & Co.* (2), intended to hold that the words

(1) 40 W. R. 608. (2) [1892] 2 Ch. 417.

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"inadvertence" and "mistake" were convertible terms, I cannot agree with him. In my judgment, the appellant fails to shew that Mr. Turnbull has either omitted to value his security, or that he did so by inadvertence, and the appellant must establish both to bring himself within the rule.

I say nothing about the length of time which has elapsed nor the other circumstances of this case, for the appellant does not, in my judgment, bring himself within the rule. I agree with the judge of the Court below, and the appeal must be dismissed with costs.

CHITTY L.J. read the following judgment:—I am of the same opinion. I think that Wright J. came to the right conclusion and on the right grounds. Turnbull in his proof mentioned his security, and stated that it was considered worthless. Did he omit to value his security? I think not. A man whose mind is directed to the question of the value of a thing, and who says "I value it at nothing," nevertheless in my opinion values it. I am unable to read this 10th rule of the 1st schedule as applying only to the case of the creditor putting some positive value on his security. I read the word "balance" in the rule as applying to the case where he does put some positive value on the security, and not as restricting the latter part of the rule to those cases only where a positive value is placed on the security. This view is supported by reference to the 12th rule of the 2nd schedule. If the creditor puts a value on his security, the trustee may at any time redeem the security on payment of the value which the creditor has put upon it. Where he values it at nothing, and votes for his whole debt, his security is deemed to be surrendered, unless the Court grants relief under the 10th rule of the 1st schedule. By valuing the security at nothing, the creditor deprives the trustee of the right to redeem which he would possess, if some positive value had been put on the security.

Then the further question arises whether the omission (supposing there was an omission) to value the security did in fact arise from inadvertence on the part of Turnbull. I think it did not. It is said that, when he stated that his security was

worthless, he was acting on information which he has since discovered to be erroneous. Is this an omission arising from inadvertence? I think not. His mind was addressed to the point. He knew he had two funds to which he could have recourse: his third mortgage, either in the whole, or in part, or not at all, and the bankrupt's estate either for the whole, or some part, or no part of his debt. He seems to me to have deliberately elected to have recourse to the estate for the whole of his debt. I agree with what Vaughan Williams J. said on this subject, when sitting in bankruptcy, in *Ex parte Clarke* (1), and also with the proposition stated by Wright J. in the present case, namely, that a deliberate election founded on misinformation as to the facts is not inadvertence. *In re Lister & Co.* (2) is distinguishable. There the creditor in his proof did not mention his security or put any value on it. He considered, though erroneously, that his security did not affect the bankrupt's estate.

The truth is that there are two minds brought to bear on this matter: the mind of Turnbull and the mind of Piers, his assignee. Turnbull carried in his proof as long ago as October, 1891, for his whole debt of 494*l.* 5*s.*, and voted upon it in March, 1892. He rested satisfied with his proof until March, 1896, when he assigned his debt and his security (if he had any) to Piers, son of the bankrupt, for 30*l.* paid and a covenant to pay 20*l.* more. The avowed object of Piers, as stated by his counsel at the bar, is to assist his father in getting his bankruptcy annulled by amending Turnbull's proof and striking out the proof of the debt altogether. The application is founded on an allegation that the value of the security, as since discovered, is equal to the debt. The amount due to the first mortgagee, Read, on his security, has apparently been greatly reduced, but not finally ascertained. The amount due to the second mortgagee, Eley, on his security is not stated. It has not been ascertained. Eley is solicitor for Piers. I am not satisfied by the evidence that Turnbull's security is now of a value equal to the amount of the debt. No doubt for his ulterior purpose Piers is now willing to estimate Turnbull's

(1) 40 W. R. 608. (2) [1892] 2 Ch. 417.

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security (if he had one to transfer) at that amount. One of his objects is to attack Read in the protracted litigation that is going on, Read holding a fourth mortgage on the same property. These facts shew that there has been a change of mind and of purpose brought about by Piers. They tend to confirm me in the opinion that there has not been any omission arising from inadvertence on Turnbull's part.

COLLINS L.J. I also am of opinion that upon the facts of this case, assuming that there was an omission to value the security, it did not arise from inadvertence. I think it would be straining the meaning of the term "inadvertence" to make it cover what happened here. I therefore agree with the decision of my brothers on that point.

On the question whether the words "omission to value" contained in rule 10 of the 1st schedule may not cover a case where there is a valuation of the security at nothing, as well as the case of an omission to value it at all, I am not satisfied that it was not the intention of the Legislature to cover both these cases by the words in that rule. The crucial point in rule 10 is that the creditor has voted in respect of his whole debt. This he may have done, either because he has omitted to value his security altogether, or because he has valued it at nothing. I doubt very much whether the Legislature could have intended that two things so nearly equivalent should lead to such different consequences as would result from them respectively, if the contention for the respondent were correct. What are the consequences of valuing the security at nothing according to that contention? Inasmuch as the valuation at nothing must be taken to be a valuation within the meaning of rule 10 of Sched. I., the creditor cannot get the benefit of the provision with regard to omission to value from inadvertence. On the other hand, he would not come within the saving clause No. 13 in the 2nd schedule, because apparently that is only applicable to a valuation at a positive amount, which makes it possible for the trustee to redeem the security on payment of that amount. Therefore, the result would be that the creditor would be excluded from rule 10 of the 1st schedule because

he had valued, and also excluded from rule 13 of the 2nd schedule because he had not valued his security. I feel great difficulty in coming to the conclusion that the Legislature intended thus to penalize one of two courses which practically amount to the same thing. According to the contention for the respondent, it would appear that, if a creditor were in making out his proof under the heading "value of security" to make no entry at all, and were subsequently to vote in respect of his whole debt, then, if his omission to insert any value arose from inadvertence, he could by leave of the Court amend his proof and retain his security; but, if he were to write "nil" under the heading, and then to vote in respect of his whole debt, his security would be gone for ever. I doubt whether the Legislature could have intended such a result. I am disposed to think, looking to the whole scheme of the rules in these schedules, that making no claim for any value in respect of the security is for the purposes of the rules equivalent to omitting to value the security. In the case of the rules referred to in the 2nd schedule it is clear that the valuation must be an assessment of the security at some positive value at which the trustee, if he thinks fit, may redeem it. In rule 10 of the 1st schedule the Legislature appear to me to be dealing with a case where a creditor votes in respect of his whole debt, because he puts no positive value upon his security. It is not necessary to decide this point in the present case, because, as I have said, I agree that the omission to put any value on the security did not arise from inadvertence. But a case conceivably might arise in which there was a valuation of the security at nothing through inadvertence; and, if such a case should arise, I should hesitate to hold that it did not come within rule 10 of the 1st schedule.

*Appeal dismissed.*

Solicitor for appellant: *W. Eley.*
Solicitor for respondent: *Thomas Edwards.*

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[IN THE COURT OF APPEAL.]

## FOX *v.* STAR NEWSPAPER COMPANY.

*Practice—Nonsuit—Discontinuance—Order* XXVI., *rr.* 1–4.

Under the existing rules of procedure a plaintiff cannot elect to be nonsuited. The only way in which an action can be discontinued is by discontinuance under Order XXVI., r. 1.

APPLICATION by plaintiff for judgment or new trial in an action tried before the Lord Chief Justice and a special jury.

The action, which was one of libel in respect of a report of proceedings in a county court published in the defendants' newspaper, came on for trial immediately after another action for libel brought by the plaintiff in respect of a report of a similar character published in another newspaper, in which action the defendants obtained a verdict. After the jury had been sworn, and the pleadings opened, the plaintiff claimed to be nonsuited. The Lord Chief Justice ruled that he was not entitled to be nonsuited, and that there must be a verdict for the defendants.

*The plaintiff in person.* The plaintiff had a right to be nonsuited. In the Rules of 1875 it was provided by Order XLI., r. 6, that a judgment of nonsuit, unless the Court or a judge should otherwise direct, should have the same effect as a judgment on the merits for the defendant. That rule was repealed by the Rules of 1883, and no similar provision is contained in those rules. The rule assumed the continued existence after the Judicature Act of the common law practice as to judgment of nonsuit, but imposed certain limitations upon it. By the repeal of the rule those limitations are removed, and therefore the matter now stands as it did before the Judicature Act. A plaintiff is therefore entitled to elect to be nonsuited.

*Blake Odgers, Q.C.*, and *Temple Franks*, for the defendants. There is no such thing now as a nonsuit in the old sense of the term, according to which the plaintiff had a right voluntarily

to elect to be nonsuited, and could then bring a fresh action for the same subject-matter. Under the Rules of 1875 the plaintiff could not of his own accord elect to be nonsuited, but, if the judge held that he had shewn no cause of action, then he might by leave of the judge be nonsuited with liberty to bring a fresh action. It is contended that the effect of Order XLI., r. 6, of the Rules of 1875 is preserved by Order LXXII., r. 2, which provides that, where no other provision is made by the Judicature Acts or rules, the existing procedure and practice shall remain in force. If that be not so, it is contended that Order XXVI., r. 1, under the heading "Discontinuance" provides exhaustively for the withdrawal by a plaintiff of his case or part of it, and by that rule he can only discontinue the action without leave before receipt of defence or, after receipt thereof, before taking any other proceeding in the action, save any interlocutory application. It is plain that that rule is not confined to "discontinuance" in the old technical sense of the term, for it provides for discontinuance at or after as well as before the trial. The existence of the old right of voluntarily being nonsuited is inconsistent with the scheme of procedure established by the rules.

The plaintiff, in reply.

A. L. SMITH L.J. In this case the plaintiff claimed to be entitled as of right to be nonsuited; but the Lord Chief Justice held that he was not so entitled, and in my opinion that decision was correct. It is quite true that since 1883 the term "nonsuit" has been used in some cases instead of "judgment for the defendants," as appears from the books; but in my opinion there is now no such thing as a nonsuit in the proper sense of the term. Before the Judicature Act a plaintiff, after he had brought the defendant into court, if he found the case going against him, or that he had not the requisite materials to support his claim, could elect to be nonsuited, with the result that he could bring a fresh action. It was intended, I think, by those who framed the Rules of 1875, that the power of a plaintiff thus to harass the defendant with further litigation on the same subject-matter after he had been

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nonsuited at a trial should be restricted. Accordingly it was provided by Order XLI., r. 6, of the Rules of 1875, that "any judgment of nonsuit, unless the Court or a judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant; but in any case of mistake, surprise, or accident any judgment of nonsuit may be set aside on such terms as to payment of costs and otherwise as to the Court or a judge shall seem just." That rule put a fetter upon the power of a plaintiff to demand as of right to be nonsuited in a common law action. It was argued that that rule still remains in force. I am clearly of opinion that it does not, because it was repealed by the existing rules, and Order LXXII., r. 2, cannot have the effect of keeping it alive. I agree with what was said on this subject by Kay J. in *Magnus* v. *National Bank of Scotland* (1), and by Cotton L.J. in *In re Busfield.* (2) I think that Order XLI., r. 6, of 1875 has been advisedly omitted from the Rules of 1883, because there is really no such thing now as a judgment of nonsuit, and it was found that the matter with which the rule dealt is provided for by the rule as to discontinuance, namely, Order XXVI., r. 1, which provides that, after a certain stage, the plaintiff cannot without the leave of the Court discontinue the action. I think the Lord Chief Justice had power to take the course which he took, and that the appeal must therefore fail.

CHITTY L.J. I am of the same opinion. The provisions of Order XXVI. of the present rules appear to me to cover the case of what was formerly termed a nonsuit. That order applies to both Divisions of the High Court. The term "nonsuit" was not known in Chancery, but a plaintiff in Chancery could formerly dismiss his own bill. Now, both Divisions being subject to the provisions of Order XXVI., it is clear that, after the stage in the proceedings indicated by rule 1 of that order, it is no longer competent to the plaintiff in an action in the Chancery Division to withdraw a matter of complaint from the Court. The same rule applies to the withdrawal of matter of

(1) (1888) 36 W. R. 602; 58 L. T. 617.

(2) (1886) 32 Ch. D. 123, at p. 131.

defence or counter-claim by the defendant. It seems to me that Order XXVI. is intended to form a complete code applicable to the whole subject of discontinuing an action. I have no doubt that the explanation of the omission from the present rules of the provision contained in the old rules as to nonsuit is that, having regard to the provisions of Order XXVI., it was seen to be unnecessary. The term "discontinuance" may have had at one time a more limited meaning than it has in Order XXVI., r. 1, but it is obvious on the face of that rule that the term is there used in a broad sense, and is intended to cover the case of what in a common law action was termed a nonsuit as well as the power which a plaintiff in Chancery formerly had of dismissing his own bill. The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer dominus litis, and it is for the judge to say whether the action shall be discontinued or not and upon what terms. I think it would be a great error to construe the rule by reference to the old meaning of the term "discontinuance" or any mere technical sense of words. The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject-matter.

Collins L.J. concurred.

*Appeal dismissed.*

Solicitor for plaintiff: *Lincoln.*
Solicitors for defendants: *Harrison & Davies.*

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## SCHWERZERHOF *v.* WILKINS.

*Factory Acts—Underground Bakehouse—Premises vacant at Commencement of Act—Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 27, *sub-s.* 3.

By s. 27, sub-s. 3, of the Factory and Workshop Act, 1895, "A place underground shall not be used as a bakehouse unless it is so used at the commencement of this Act." Premises which had long been used as an underground bakehouse were vacant at the commencement of the Act, but their owner was seeking a tenant for them as a bakehouse:—

*Held*, that they were used as a bakehouse at the commencement of the Act.

CASE stated by a metropolitan magistrate under the Summary Jurisdiction Acts.

An information was preferred by the respondent, who was the sanitary inspector for the vestry of St. Mary, Battersea, against the appellant, who was a baker, for that he on October 15, 1897, had used an underground bakehouse contrary to the provisions of the Factory and Workshop Act, 1895.

By s. 27, sub-s. 3, of that Act, "A place underground shall not be used as a bakehouse unless it is so used at the commencement of this Act." The Act came into operation on January 1, 1896.

It appeared that the premises in question had been fitted up with an underground bakehouse in 1879, and had been occupied and used as baker's premises down to October, 1895, when the tenant left. The owner then put the premises into repair, and the work was completed about Christmas, 1895.

Whilst the work was in progress there were exhibited in the windows of the premises posters stating that such premises (described in the posters as "These commanding baker's premises") were to be let, and that there was a good oven on the premises. The underground bakehouse and oven were at the same time put into repair.

The appellant became the tenant of the premises in February, 1896, and at once commenced to use the underground bakehouse for the purposes of his business, and had continued to do so down to October 15, 1897.

It was contended for the appellant that the premises were used as a bakehouse within the meaning of the Act at the time when the Act came into operation.

The magistrate, however, held that the place was not used as a bakehouse on January 1, 1896, and convicted the appellant, but stated this case for the opinion of the Court.

*Joseph Walton, Q.C.* (*Hume Williams*, with him), for the appellant. The object of the Act was to prevent the creation of new underground bakehouses, and it did not affect those already in existence. A mere interruption of the actual user of the place as a bakehouse at the moment the Act came into operation is not sufficient to exclude an underground bakehouse from the benefit of the exemption. In this case the use of the place as a bakehouse had not been abandoned, but the owner was seeking a tenant for it as a bakehouse. He was, therefore, using it as a bakehouse on January 1, 1896, for the purpose of letting it as such.

[He was stopped.]

*J. C. Earle* (*Bray, Q.C.*, with him), for the respondent. The magistrate has found as a fact that it was not used as a bakehouse on January 1, 1896, and with that finding the Court cannot interfere. If, however, the question is open, it is submitted that the mere fact that the place was described as a bakehouse on that date is not sufficient. To satisfy the Act it must be in actual use, and as the premises were unoccupied there could be no such use.

WRIGHT J. There is no doubt a considerable element of fact in this case, but I think that the question submitted to us is a question of law, and that we can answer it in only one way. In my opinion this was a bakehouse so used at the commencement of the Act. I am far from saying that there might not be cases in which the Court would take a different view. Here, however, the premises had been used as a bakehouse until October, 1895. Then the tenant goes out, and the landlord puts the place in repair as a bakehouse, and advertises it to be let as a bakehouse. I cannot think that in law there was any

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interruption of its use as a bakehouse. It is clear that the mere fact of a change of tenancy would not operate as such an interruption. If one tenant had immediately succeeded to another no question could have arisen. No doubt in one sense it is a question of degree, and that of course is a question of fact; but the question of law here is whether, on the facts as found by the learned magistrate, there was an interruption of the use of the premises as a bakehouse. I do not think that there was; and this conviction must therefore be quashed.

DARLING J. I am of the same opinion. The Act says a place underground shall not be used as a bakehouse unless it is so used at the commencement of this Act, and it is said that because when the Act came into operation the place was under repair and without a tenant, it was not used as a bakehouse at that time. In my opinion the landlord of the premises, who was trying to let them as baker's premises, was as much using this place as a bakehouse on January 1, 1896, as if he had been a baker in actual occupation of it.

*Conviction quashed.*

Solicitor for appellant: *John Othen, Junr.*
Solicitors for respondent: *W. W. Young & Son.*

A. P. P. K.

## SPENCER *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

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*Railway—Passenger—Inspector of Weights and Measures—Police Officer—Conveyance at reduced Rate—Cheap Trains Act*, 1883 (46 & 47 *Vict. c.* 34), *s.* 6.

A police officer, appointed by the county council an inspector of weights and measures, is not entitled, when travelling as such inspector, to conveyance at the reduced rate provided by s. 6 of the Cheap Trains Act, 1883, for the conveyance of the police on occasions of the public service.

APPEAL by the plaintiff from the decision of the judge of the county court at Manchester.

The plaintiff, who was an officer of the Lancashire County Police Force, had been appointed by the county council an inspector of weights and measures under the Weights and Measures Act, 1878. (1) He did police duty when required. His salary was paid out of the county fund. In December, 1896, he was travelling by the defendants' railway in the course of the performance of his duty as inspector of weights and measures. He produced a route or order signed by the superintendent of police of the district, and asked for a ticket at a reduced rate under the Cheap Trains Act, 1883. (2) This was

(1) 41 & 42 Vict. c. 49. By s. 43, "Every local authority shall from time to time appoint a sufficient number of inspectors of weights and measures for safely keeping the local standards provided by such authority, and for the discharge of the other duties of inspectors under this Act," and the section further provides that such inspectors shall enter into a recognizance to the Crown in the sum of 200*l.* for the performance of their duties.

(2) 46 & 47 Vict. c. 34. By s. 6, sub-s. 1, "For the purpose of moving by railway on any occasion of the public service . . . . any officers or men of any police force . . . . every railway company shall, on the production of a route duly signed for the conveyance of the forces, provide conveyance for them . . . . on such terms as may be agreed on between the railway company and the Secretary of State, Admiralty, or Police Authority, and subject to or in default of agreement on the following terms" (as specified, including a reduced rate).

By sub-s. 2, "For the purposes of this section a route duly signed shall be deemed to be, . . . . as regards the police, a route or order signed by a person authorized in this behalf by the police authority."

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refused, and he was charged the full fare. He brought this action to recover the sum of 2*d.*, being the difference between the amount of the full fare, which he had paid, and the amount of the fare at the reduced rate, at which he claimed to be entitled to travel. It was admitted that the route or order was duly signed, if the plaintiff was entitled to the benefit of the Cheap Trains Act. The county court judge thought that the plaintiff was not rightly appointed an inspector of weights and measures, having regard to the County Police Act, 1839 (2 & 3 Vict. c. 93), s. 10, prohibiting constables from exercising other employments, but he held that the plaintiff was not travelling on the public service, and on that ground gave judgment for the defendants, with leave to appeal.

*Pickford, Q.C.* (*E. W. Jordan* with him), for the plaintiff, in support of the appeal. The plaintiff was entitled to a ticket at the reduced rate specified in s. 6 of the Cheap Trains Act, 1883. That section applies to "any officers or men of any police force," without any exception, and does not provide that they must be engaged on duty as police. The plaintiff was travelling in the performance of the duties of a public office—that of inspector of weights and measures—to which he was appointed under the Weights and Measures Act, 1878, s. 43. That the office is a public one is shewn by the provision in that section requiring a recognizance to the Crown. He was therefore travelling on an "occasion of the public service," within the meaning of s. 6 of the Cheap Trains Act, 1883, and was entitled to the benefit of that Act.

*C. A. Russell, Q.C.* (*T. F. Byrne* with him), for the defendants, was not called on.

WRIGHT J. I think it is not desirable that we should express any opinion on any point which is not properly raised on this appeal. On the only point which is raised I have come to the conclusion that the Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), s. 6, does not apply to an inspector of weights and measures when travelling as such and not as a police officer. That being so, it follows that the plaintiff in the present case

is not entitled to succeed, and the decision of the county court judge is right and must be affirmed.

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DARLING J. I am entirely of the same opinion. My only doubt with regard to the matter is whether railway companies have not already gone further than they need have gone in allowing persons to travel under the Cheap Trains Act.

*Appeal dismissed.*

Solicitor for plaintiff: *F. C. Hulton, Preston.*
Solicitor for defendants: *Christopher Moorhouse, Manchester.*

P. B. H.

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[COMMERCIAL COURT.]

1898
*March* 4.

## OWNERS OF CARGO ON BOARD SS. WAIKATO *v.* THE NEW ZEALAND SHIPPING COMPANY, LIMITED.

*Ship—Bill of Lading—Exemption of Shipowner from Liability—"Defects latent on beginning voyage or otherwise."*

A bill of lading contained among other exemptions one by which the shipowner was not to be liable for loss or damage arising from "defects latent on beginning voyage or otherwise":—

*Held*, that although this would cover latent defects which might either exist at the commencement of the voyage or occur during the course of the voyage, it would not cover defects which were obvious at the commencement of the voyage.

PRELIMINARY question tried before Bigham J. in the Commercial Court.

The action was brought by the owners of a cargo of wool shipped on board the defendants' ship *Waikato* for damages for breach of contract and breach of duty in the carriage of the same.

The second clause of the bill of lading was as follows: "The act of God, the Queen's enemies, pirates, robbers by land or sea, detention, delay, or loss of any description, arising from strikes or locks out of officers, engineers, seamen, workmen, or labourers,

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or any circumstances beyond the shipowners' control, restraint of princes, rulers, or people, collision, stranding, jettison, barratry, loss or damage arising from accidents to or defects latent on beginning voyage or otherwise, or to hull, tackle, boilers, or machinery, or their appurtenances, steam or bursting or leakage of pipes, or from explosion, heat, or fire on board, in bulk or craft or on shore, any act neglect or default whatsoever of pilots, master or crew or other servants of the company, the dangers and accidents of the seas, rivers, and canal and of navigation of whatever nature or kind are excepted."

For the purpose of the preliminary question it was assumed that the wool had sustained damage by reason of the part of the *Waikato* in which the wool was stowed being insulated for use as refrigerating chambers, and consequently not properly ventilated for the carriage of wool. The question was whether this was an excepted defect within the meaning of clause 2 of the bill of lading.

*Joseph Walton, Q.C.* (*F. Laing* with him), for the defendants. Assuming that the damage was caused by the want of ventilation, that is a damage arising from a defect within the meaning of the bill of lading.

[BIGHAM J. I am inclined to hold that the shipowner is exempted by the bill of lading from responsibility for damage from latent defects whether such existed at the beginning of the voyage or whether they arose in the course of the voyage.]

It must be admitted that this was not a latent defect; but the exception in this bill of lading was intended to go further than the exception in *Owners of Cargo on Ship Maori King* v. *Hughes*. (1) The words "or otherwise" cover defects of all kinds, and whether at the beginning or during the course of the voyage.

[He referred to *Steel* v. *State Line Steamship Co.* (2); *Norman* v. *Binnington* (3); *Baerselman* v. *Bailey*. (4)]

*Asquith, Q.C.*, and *Scrutton*, for the plaintiffs, were not called upon to argue.

(1) [1895] 2 Q. B. 550.
(2) (1877) 3 App. Cas. 72.
(3) (1890) 25 Q. B. D. 475.
(4) [1895] 2 Q. B. 301.

BIGHAM J. The common law obligation of a shipowner is to provide a ship reasonably fit to carry the cargo that is shipped upon it. If a shipowner desires to evade this responsibility he must, I think, use very plain and distinct words to give notice of his intention to get out of this obligation. A bill of lading is in the ordinary course given to the cargo-owner after the cargo has been put on board, and he is supposed, if he does not expressly object, to assent to the terms contained in such bill of lading. But considering that his opportunity for taking such objection is not large, I think that the shipowner ought to tel the cargo-owner in the plainest possible language what those terms are. It is contended that by this bill of lading the shipowner has told the cargo-owner that he (the shipowner) is not to be responsible for any damage that may occur to the cargo in consequence of any defect whatever in the condition of the ship, even although the ship should start on her voyage in an obviously unfit condition for the carriage of such cargo. That seems to me to be so unlikely to be the contract between the shipowner and the charterer that, unless I can find it set out in the plainest possible terms, I cannot so construe the bill of lading. The clause may mean, and very likely does mean, that the shipowner is not to be responsible for any damages arising from latent defects which may either exist at the beginning of the voyage, or occur during the course of the voyage. Mr. Walton, however, contends that the clause goes much further, and exempts the shipowner from liability for damage arising, not only from defects which he cannot discover, and therefore cannot provide against, but also from defects which he can see and can consequently remedy. That is, he contends, the effect of the words "or otherwise" in the bill of lading. I do not think that those words would convey that idea to the mind of any ordinary person reading this clause, and I think that if they were intended to convey that idea they were not at all apt for that purpose. The shipowner must use language very different to this: he must use very plain and simple words, if he wishes to tell the cargo-owner that he must insure against damage arising from every sort of defect, whether patent or latent, and whether existing

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at the beginning of the voyage or arising during the course of it.

I therefore give judgment for the plaintiffs.

*Judgment for the plaintiffs.*

Solicitors for plaintiffs: *Thomas Cooper & Co.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

A. P. P. K.

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*Jan.* 10; *Feb.* 4.

## MOLYNEUX *v.* FLETCHER AND CLARK.

*Will—Construction—Advancement Clause—Power to apply Part of Presumptive Share towards Advancement in Life of Child.*

A testator bequeathed his estate to trustees on trust to pay the income to his children in equal shares, and gave power to the trustees to apply "in or towards the advancement in life of each child a sum not exceeding 500*l.* of his or her presumptive share." The trustees were to be the sole judges of the advisability of such payment and of the signification of the term "advancement in life." After the share of a married daughter had become vested, the trustees at her request advanced 250*l.* to her under this power with knowledge that the sum so advanced would be used to pay a debt due from her husband to one of the trustees:—

*Held*, that this was not a bonâ fide exercise of the power, and was therefore a breach of trust.

*Semble*, that there was no power to make any advance after the share had become vested.

FURTHER CONSIDERATION before Kennedy J.

By his will, dated April 18, 1878, Edward Durant left all his real and personal estate to trustees on trust for sale and investment, and to stand possessed of the income thereof in trust for his children in equal shares. The shares of the daughters were to be for their separate use and not by way of anticipation; and after the death of each daughter her share was to be held in trust for all or any of her children in such manner as she might by deed or will appoint, and in default of appointment for such children in equal shares. But if there should be no child of such daughter who should attain the age

of twenty-one years, then the share of such daughter was to be held in trust for such persons as she might by her last will appoint, and in default of appointment for her next of kin.

The will contained the following proviso: "It shall be lawful to apply in or towards the advancement in life of each child of mine a sum not exceeding 500*l.* of his or her presumptive share, such sum, or any lesser sum, to be paid, if my trustees shall think fit, to any daughter of mine notwithstanding her share is settled, and my trustees shall be the sole judges of the advisability of such payment and of what the term 'advancement in life' may signify."

The testator died on April 20, 1878, leaving two daughters, Fanny Jane, who attained the age of twenty-one years on June 11, 1880, and Amelia Margaretta, who attained the age of twenty-one years on September 5, 1881, and on March 16, 1885, married Daniel Webster Molyneux. The plaintiffs were the infant children of this marriage. In November, 1887, the trustees of the will were the defendant Fletcher and one Thomas Urmson Clare. At that time D. W. Molyneux was heavily indebted to the defendant Fletcher, who traded as Fletcher & Co. It was accordingly arranged that the trustees should advance, under the power contained in the will and above set out, the sum of 500*l.* to Fanny Jane Durant, and the sum of 250*l.* to Amelia Margaretta Molyneux. This they accordingly did on the request of these ladies, and the amount was at once handed over by them to D. W. Molyneux, and used by him to pay his debt to Fletcher & Co. All this was done with the knowledge of the defendant Fletcher.

The defendant Clark was appointed a trustee on September 22, 1896, in the place of Thomas Urmson Clare and jointly with the defendant Fletcher.

The action was brought by the infant children of Mr. and Mrs. Molyneux against the trustees, claiming a declaration that the advance and payment of the 250*l.* and 500*l.* was a breach of trust, and that the defendant Fletcher was liable to repay the same. Neither Miss Durant nor Mrs. Molyneux were made parties to the action.

The defendant Clark in his statement of defence denied that

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any breach of trust had been committed by the defendant Fletcher.

The action was tried before Kennedy J. at Liverpool, and the questions of law reserved for further consideration.

*McCall, Q.C.*, and *Rotch* (*H. Cuningham* with them), for the defendant Fletcher. As to the 500*l.* advanced to Miss Durant, the plaintiffs have no claim. Unless she had made a will appointing the fund in their favour (as to which there is no evidence), or unless she were to die unmarried and intestate, in which case they might possibly succeed as her next of kin, they have no interest in her share of the fund. The mere hope of succession is no ground on which to found a claim: *In re Parsons, Stockley* v. *Parsons* (1); *Clowes* v. *Hilliard*. (2)

As to the 250*l.* advanced to Mrs. Molyneux, the trustees in making the advance were acting within their powers. By the express terms of the will they were to be the sole judges of the advisability of making such advance and of the signification of the term "advancement in life." Admitting that the money was to be used in rehabilitating Mr. Molyneux's business, that would be for the advantage and, therefore, in the view of the trustees, for the advancement in life of his wife and children. The Court will not interfere with the discretion of trustees when exercised bonâ fide: *Gisborne* v. *Gisborne*. (3) The payment of debts has been held to be an advancement: *Lowther* v. *Bentinck* (4); *In re Brittlebank* (5); *In re Kershaw's Trusts*. (6)

*W. F. K. Taylor, Q.C.*, and *McConkey*, for the plaintiffs. The Court has to see whether the trusts of the will have been properly carried out, and whether the interests of the infants have been properly protected. The Court will interfere on behalf of infants if it is shewn that their possible or contingent interests have been affected. Therefore, with regard both to the 500*l.* advanced to Miss Durant and the 250*l.* advanced to Mrs. Molyneux, the plaintiffs are entitled to a declaration that

(1) (1890) 45 Ch. D. 51.
(2) (1876) 4 Ch. D. 413.
(3) (1877) 2 App. Cas. 300.
(4) (1874) L. R. 19 Eq. 166.
(5) (1881) 30 W. R. 99.
(6) (1868) L. R. 6 Eq. 322.

there has been a breach of trust. The trustees had no power to make these advances. The use of the word "presumptive" shews that the intention of the testator was that the advance should only be made before the shares became "vested." After the shares vested, therefore, there was no power to make the advances at all. But even assuming that the trustees were acting within the terms of the will, the advances were not made bonâ fide for the advancement of Miss Durant and Mrs. Molyneux, but indirectly for the purpose of paying Mr. Molyneux's debts to Fletcher. Trustees are not justified in advancing a married daughter's share in order to enable her to pay her husband's debts: *Talbot* v. *Marshfield* (1); and where a power is not exercised bonâ fide, it will never be supported by the Court: *Duke of Portland* v. *Topham* (2); *Humphrey* v. *Olver*. (3)

[They also cited *Kirby* v. *Mash*. (4)]

*Pickford, Q.C.*, and *Segar*, for the defendant Clark.

*Cur. adv. vult.*

Feb. 4. KENNEDY J. In this case the action is brought by a number of infants by their next friend against two gentlemen, Mr. Fletcher and Mr. Francis Clark, claiming that there has been a breach of trust committed by the defendant Mr. Fletcher as a trustee acting under the will of the grandfather of the infants, Mr. Edward Durant. Mr. Fletcher is not one of the original trustees named under the will, but was subsequently, with another trustee who has since ceased to be a trustee, appointed one of the trustees under that will.

By the terms of the will, which is dated April 18, 1878, the testator appointed trustees and executors, and devised and bequeathed to them his real and personal estate, with certain declarations as to realizing investments, and then proceeded to make provision as to the beneficiaries under the will. As a matter of fact, he had then, and he left surviving him, two daughters, who were infants at the date of the will and at the date of the testator's death, which took place two days after

(1) (1868) L. R. 3 Ch. 622.
(2) (1864) 11 H. L. C. 32.
(3) (1859) 28 L. J. (Ch.) 406.
(4) (1839) 3 Y. & C. 295.

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the will was made. One of the daughters, Fanny Jane Durant, attained her majority in 1880. The other daughter, Amelia Margaretta, attained her majority in 1881. The elder daughter still remains unmarried. The younger daughter, Amelia Margaretta, within four years of attaining her majority married Mr. Molyneux, and she and her husband as well as Miss Durant are still living. The infant plaintiffs are the children of the marriage of Amelia Margaretta Durant with Mr. Molyneux. Neither Miss Durant nor Mrs. Molyneux are parties to this action. The defendant Mr. Fletcher became a trustee under the will in 1887, and the other defendant, Mr. Clark, has become a trustee recently only, and long after all the events in respect of which the claim is made had taken place. It is alleged that in December, 1887, Mr. Fletcher and his then co-trustee, a Mr. Clare, committed a breach of trust in advancing out of the capital funds to Miss Durant 500*l.* and to Mrs. Molyneux 250*l.* The question is whether in regard to either or both of those sums the plaintiffs are entitled to succeed. In other words, were these advances breaches of trust? Now there is in this will, after giving the benefit to these two daughters, a direction that it shall be lawful for the trustees to apply in or towards the advancement in life of each child of the testator a sum not exceeding 500*l.* of his or her presumptive share, such sum or any lesser sum to be paid if the trustees shall think fit to any daughter of the testator, notwithstanding that her share was settled as thereinafter mentioned, and the trustees shall be the sole judges of the advisability of such payment and of what the term "advancement in life" might signify. Subject to that power, the trustees were, after the share became vested in each child, to pay the income of the estate to the sharing children. There was a further trust that after the death of either of the two daughters it was to be held in trust for their respective children in such manner as the daughters, notwithstanding coverture, should by deed or will respectively appoint, and in default of appointment on certain trusts in favour of such children.

The action is based on a claim that the moneys paid by Mr. Fletcher in December, 1887, were paid in breach of trust

because they were not paid with a view to the advancement in life of the beneficiaries, but with a view to Mr. Fletcher's own interest. Mr. Fletcher was a large creditor of Mrs. Molyneux's husband, and was pressing him for payment, and it is alleged that this money, though nominally advanced for the purposes under the will of the advancement in life of the beneficiaries, was really only advanced in order that it might pass through the hands of the two ladies into those of Mr. Fletcher again. Before dealing with this allegation, I think that I ought to indicate my opinion upon another point which was not raised on the pleadings, but to which I called attention during the course of the argument. According to my construction of the will, there was no power at the time this money was advanced for the trustees to make any such advance at all. It is clear on the authorities, one of which is the judgment of Jessel M.R. in *Lowther* v. *Bentinck* (1), that a power to apply capital for the advancement in life of a child has a well-recognised meaning. Sometimes enlarging expressions, such as "or otherwise for the benefit," are used. In the absence of any such enlarging expression, the word "advancement," as pointed out by Malins V.-C. in *In re Kershaw's Trusts* (2), is to be read as a word appropriate to an early period of life. The cases cited shew that, in the opinion of the learned judges who decided them, the word "advancement," if standing by itself without the addition of larger words, has a narrow and restricted meaning. Here I have the words "advancement in life" alone, and there is further the limitation that the advance is not to exceed "500*l.* of his or her presumptive share." It seems to me that the word "presumptive" refers to the period when the share is not vested. At the time the will was made, and, indeed, at the time of the death of the testator, the beneficiaries were infants. It is, therefore, easy to understand both the usefulness of the power and the reasonableness of the limitation. Looking at it as a matter of construction, I am of opinion that the word "presumptive," unless it is to be neglected altogether, limits the power of advancement to the time at which the share is presumptive,

(1) L. R. 19 Eq. 166. (2) L. R. 6 Eq. 322.

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and therefore, as the alleged advances of capital, in the case both of Mrs. Molyneux and Miss Durant, were made when the shares of these ladies had ceased to be "presumptive" and had become "vested," they could not properly be made under the terms of this will. It is true that this point has not been pleaded; but if it stood alone—as I am dealing with the case of infants—I should not allow such a breach of trust to be passed over merely because the claim of the infant plaintiffs was not based on this ground in the statement of claim. But I do not think that it is necessary for me to rest my decision on this ground, because on the facts it seems to me that the advances made by Mr. Fletcher and his then co-trustee in December, 1887, cannot be supported.

No doubt a large discretion is given to the trustees by the will, but I do not think that, large as that discretion is, it could be extended so as to cover these advances. The interests are given by the testator to his daughters for their respective lives for their separate use and free from anticipation, and I should doubt whether in the case of either daughter an advance to pay the debts of the husband of one of them could by any possibility be considered as an advance for her advancement in life. In *Talbot* v. *Marshfield* (1) it was held that a power of advancement for setting up the children of the testator in business would not justify the trustees in advancing a married daughter's share in order to pay her husband's debts. On the facts here, I am obliged to come to the conclusion that it was well understood that the moneys when advanced would be used for paying debts and liabilities in business of Mr. Molyneux in respect of part of which bills to fall due at various dates ahead had been given by Mr. Molyneux to Mr. Fletcher before the advances were made, and that moneys so provided cannot constitute a proper or justifiable advance under the will I have no doubt. The law was laid down in *Duke of Portland* v. *Topham* (2) that a person having a limited power must execute it without any ulterior object. He must act in good faith, and with a single view to the real purpose and object of the power. This is shewn also in *Humphrey* v.

(1) L. R. 3 Ch. 622.

(2) 11 H. L. C. 32.

*Olver*. (1) No doubt in this case Mr. Fletcher received a formal request from both Mrs. Molyneux and Miss Durant for the advancement of the money—500*l*. to Miss Durant and 250*l*. to Mrs. Molyneux; but it is quite clear to me that Mr. Fletcher knew that the money would be used by Mr. Molyneux. I ought in justice to Mr. Fletcher to say that, no doubt, he believed that whatever was done with the money would be done with the consent of Mrs. Molyneux and Miss Durant, and that, upon the evidence before me, I have no doubt that they did consent to the use which was made of the moneys in question, and that Mrs. Molyneux, at all events, knew beforehand how they were going to be paid and employed.

But now comes the question as to the position of the plaintiffs, who are the infant children of Mrs. Molyneux. It is, I take it, the rule of equity that where a trustee has committed a breach of trust of this kind with the consent of the tenants for life he will be entitled as against them to an indemnity. Mrs. Molyneux and Miss Durant are not parties to this action, and, therefore, the order that I am about to make will be without prejudice to any action which Mr. Fletcher may be advised to take against Mrs. Molyneux in respect of the 250*l*. The position of the plaintiffs with regard to the 500*l*. and to the 250*l*. advanced respectively to Miss Durant and to Mrs. Molyneux is different. With regard to the 500*l*. advanced to Miss Durant, I am unable to give them relief, and for this reason. Their interest in the 500*l*. depends solely upon a possibility. If Miss Durant marries and has children she will be bound by the terms of the will as regards the interests of those children. If she dies unmarried she has power to dispose of her share by will. Only in the event of her dying unmarried and intestate will her share become divisible among her next of kin, whoever they may then be. The plaintiffs, therefore, only in this last case might have an interest in this money, and that does not seem to me to be an interest which entitles them in this action to make any claim in respect of it. I gather that to be the effect of the decisions to which I have been referred: *Clowes* v.

(1) 28 L. J. (Ch.) 406.

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*Hilliard* (1); *In re Parsons, Stockley* v. *Parsons*. (2) Therefore, as regards the 500*l*. I give no relief.

As to the 250*l*., I must decree that there has been a breach of trust by Mr. Fletcher in regard to it, and that it shall be replaced for the benefit of the plaintiffs. If Mrs. Molyneux had been made a party to these proceedings, I could have given Mr. Fletcher liberty to apply in this action with a view to enforcing a right to indemnity against her, as was done in *In re Holt*. (3) But as she is not a party I cannot make that order. I direct, therefore, that the sum of 250*l*. be paid into court and remain there until further order. As to the other defendant, Mr. Clark, he has recently become a trustee, and he has had no part in the breach of trust committed by Mr. Fletcher. He has, however, chosen to side with his co-trustee, and has pleaded in this action a denial that Fletcher had committed any breach of trust. He has chosen to take up that position when he might have stood on one side, and, therefore, as against these infants, I cannot give him costs, but I shall leave him to bear his own costs.

Solicitors for plaintiffs: *Horrocks & Christian Jones, Liverpool.*

Solicitors for defendants: *Masters & Rogers, Liverpool.*

(1) 4 Ch. D. 413. (2) 45 Ch. D. 51.
(3) [1897] 2 Ch. 525.

A. P. P. K.

## THOMAS *v.* ROBERTS. SMITH, CLAIMANT.

1898
*March* 22.

*Bill of Sale—Validity—Filing of Copy and Affidavit—Date of Execution—Omission from Copy—Insertion in Original and in Affidavit—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 2.

A bill of sale is not void because the copy of the bill of sale, required to be filed by s. 10, sub-s. 2, of the Bills of Sale Act, 1878, leaves the date of the execution of the bill of sale in blank, if the date is truly stated in the original bill of sale, and in the affidavit filed under the same section.

APPEAL by the claimant in interpleader under a bill of sale from the decision of the deputy judge sitting at the Marylebone County Court, who held the bill of sale, dated November 10, 1897, bad, on the ground that no true copy of the bill of sale had been filed as required by s. 10, sub-s. 2, of the Bills of Sale Act, 1878. (1)

A copy of the bill of sale, and an affidavit of its execution had been filed within seven days after the making of the bill of sale; but in the copy the day of the month on which the bill of sale was executed was omitted, the date being left in blank. Both in the original bill of sale, and in the affidavit filed under the Act, the date of the execution of the bill of sale was truly stated. (2)

*Turrell*, for the claimant, in support of the appeal. The object of the provisions in the Bills of Sale Acts requiring registration is to enable persons who have occasion to search

(1) 41 & 42 Vict. c. 31. By s. 10, sub-s. 2, "Such bill, with every schedule or inventory thereto annexed, or therein referred to, and also a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation . . . . shall be presented to, and the said copy and affidavit shall be filed with, the registrar within seven clear days after the making or giving of such bill of sale . . . ."

(2) Another point was suggested, as to the correctness of the statement of the grantor's address; but it appeared that no decision as to this had been given in the county court.

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the register to obtain the information which they require. This is satisfied in the present case, for as soon as any one who is searching refers to the affidavit, he will find out all he wants to know. It is true that s. 10, sub-s. 2, of the Act requires "a true copy" to be filed, but the copy need not necessarily be exact, and a clerical error in it will not invalidate the bill of sale: *In re Hewer, Ex parte Kahen.* (1) There is nothing here that can possibly mislead.

[WRIGHT J. In *Tuck* v. *Southern Counties Deposit Bank* (2) this point appears to have been raised in argument in the Court of Appeal, but it does not appear to have been dealt with or noticed in the judgment.]

*Frank Mellor*, for the execution creditor. The particulars required by s. 10, sub-s. 2, must appear in the bill of sale; it is not enough if they appear in the affidavit: *Parsons* v. *Brand*; *Coulson* v. *Dickson.* (3)

[WRIGHT J. There the original bills of sale were inaccurate.] The omission of the date may mislead.

WRIGHT J. On the first point taken on this appeal I have come to the conclusion that the bill of sale is not bad. If the defect complained of were a defect in the original bill of sale, no doubt it would invalidate the instrument, as was decided in *Parsons* v. *Brand* (3); but the defect in the present case was only in the copy, and any one searching the register and looking at the affidavit filed with the copy under s. 10, sub-s. 2, of the Bills of Sale Act, 1878, would find out at once what the true date of the bill of sale was. In *Tuck* v. *Southern Counties Deposit Bank* (2), no one seems to have thought very much of the point now taken. The Court did not deal with it in delivering judgment, though it appears to have been mentioned in the argument. The omission of the date in the present case seems to me to be of still less importance than the erroneous date in that case. We are not in a position to decide the other point which has been suggested, so the case must go back to the county court for a new trial.

(1) (1882) 21 Ch. D. 871. (2) (1889) 42 Ch. D. 471.
(3) (1890) 25 Q. B. D. 110.

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DARLING J. I am of the same opinion. *Tuck* v. *Southern Counties Deposit Bank* (1) is not a direct decision of the learned judges who formed the majority of the Court of Appeal in that case as to the point now before us; but it is clear that Mr. Butcher, in his argument for the respondent, distinctly raised the point, for he said: "We also object to the defendants' bill of sale, that the registration was irregular and defective; there was no true copy of the deed, the date being erroneous. It is said that the error was corrected in the affidavit, but that is not sufficient. The object of the provision is that those who search the registry may not be misled, and this is a mistake which is important and might mislead an intended assignee of the goods" (2); and he cites authorities. I agree with the statement there made as to the object of the provision; but it is obvious that the Lords Justices who formed the majority of the Court did not accede to the contention as to the effect of the error. In the present case the omission would not mislead any one who looked at the affidavit, for he would there find the date correctly stated. It is true that in the copy there is no date; but there is no actual inconsistency between the copy and the original, and a person searching would have full notice of the provisions of the bill of sale, if he looked at the affidavit.

*Order for a new trial.*

Solicitor for appellant: *J. Howard Smith.*
Solicitor for respondent: *A. H. D. Nonweiler.*

(1) 42 Ch. D. 471.

(2) 42 Ch. D. at p. 480.

P. B. H.

1898
*March 22.*

## HEMMING AND OTHERS *v.* DAVIES.

*County Court—Jurisdiction—Remitted Action—Bankruptcy of Plaintiff—Joinder of Trustee—Security for Costs—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 94.

Where an action of contract, brought in the High Court, is ordered to be tried in a county court, under s. 65 of the County Courts Act, 1888, and before the plaintiff has lodged the original writ and the order with the registrar of the county court, he becomes bankrupt, and a trustee is appointed, and an order is made joining the trustee as plaintiff in the action, the judge of the county court has no jurisdiction to order the trustee to give security for the costs of the action under s. 94.

APPEAL by the plaintiff Sharp, who was the trustee in bankruptcy of the other two plaintiffs, from an order made by the judge of the county court at Birmingham, directing that he should give security for the costs of the action.

The action was commenced in May, 1897, in the High Court, by the plaintiffs Hemming and Johnson, to recover 57*l.* 8*s.* 6*d.* for goods sold and delivered. On June 5 leave was given to defend, and at the same time an order was made, under the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65 (1), that the action be tried in the county court at Birmingham. On August 30 the plaintiffs, Hemming and Johnson, became bankrupt. On October 7 Sharp was appointed trustee in the

(1) 51 & 52 Vict. c. 43, s. 65: "Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.*, or where such claim, though it originally exceeded 100*l.*, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding 100*l.*, it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers to order such action to be tried in any court in which the action might have been commenced, or in any court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly; and thereupon the plaintiff shall lodge the original writ and the order with the registrar of the court mentioned in the order, who shall appoint a day for the trial of the action, notice whereof shall be sent by post or otherwise by the registrar to both parties or their solicitors, and the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein."

bankruptcy. On December 31, Sharp applied for and obtained an order ex parte joining him as co-plaintiff in the action. On January 14, 1898, the plaintiff lodged the writ and the order remitting the action with the registrar. On January 24, 1898, the county court judge made the order now appealed from for security for costs, under s. 94 of the County Courts Act, 1888. (1)

*Houghton*, for the appellant. The county court judge had no jurisdiction to order security for costs. If no order had been made for trial in the county court, clearly security could not have been ordered, and until the writ and order were lodged with the registrar the action remained in the High Court: *Welply* v. *Buhl* (2); *D'Errico* v. *Samuel*. (3) Sect. 94 of the County Courts Act, 1888, does not apply.

*Stamford Hutton*, for the defendant. The two cases referred to were on different sections, and were actions of tort, and therefore are distinguishable. Sect. 94 governs the case; that section must be read together with s. 65, and if that is done it will be apparent that it was intended that security for costs should be given in such cases as this.

WRIGHT J. This case depends entirely on the dates, which were as follows. In May, 1897, an action was commenced, in the High Court of Justice, by the plaintiffs, Hemming and Johnson, against the defendant, to recover a sum of 57*l.* 8*s.* 6*d.* for the price of goods sold and delivered. On June 5 leave to defend was given, and at the same time an order was made, under the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65, that the action be tried in the county court at Birmingham.

(1) 51 & 52 Vict. c. 43, s. 94: "The bankruptcy of the plaintiff in any action in the Court which the trustee might maintain for the benefit of the creditors, shall not cause the action to abate if the trustee shall elect to continue such action, and to give security for the costs thereof, within such reasonable time as the judge shall order, but the hearing of the action may be adjourned until such election is made; and in case the trustee does not elect to continue the action and to give such security within the time limited by the order, the defendant may avail himself of the bankruptcy as a defence to the action."

(2) (1878) 3 Q. B. D. 80, 253.

(3) [1896] 1 Q. B. 163.

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On August 30 the plaintiffs Hemming and Johnson became bankrupt, and on October 7 Sharp was appointed trustee in the bankruptcy. On December 31, 1897, Sharp made an ex parte application in the High Court, under Order XVII., rr. 4 and 5 of the Rules of the Supreme Court, 1883, and obtained an order that he should be added as a plaintiff in the action. No application to discharge or vary that order was made within twelve days. On January 14, 1898, the writ and the order remitting the action were lodged with the registrar of the Birmingham County Court. On January 24, 1898, an order was made by the county court judge that the plaintiff Sharp, the trustee in bankruptcy of the two other plaintiffs, should give security for the costs of the action under s. 94 of the County Courts Act, 1888, and the present appeal is from that order. Now when the writ and the order remitting the action were lodged with the registrar of the county court the action became a county court action; but after the order remitting the action was made, on June 5, the writ and order were not lodged for a long time. Meanwhile on December 31 the trustee in bankruptcy obtained an order joining him as plaintiff, while the action was still an action in the High Court. It is clear that a plaintiff could not be ordered to give security for the costs of an action in the High Court, on the ground that he was a trustee in bankruptcy. On January 14, 1898, the action became a county court action, and on January 24 the order for security for costs was made. It seems to me that the learned county court judge was wrong in making that order. Before the action became an action in the county court, it was changed from an abating action by the bankrupts to an action in which the trustee in bankruptcy was joined as a plaintiff, and which could not abate. I am of opinion that the county court judge had no power to make the order in question, on the ground that the action never, during the time when it was a county court action, was within the terms of s. 94 of the County Courts Act, 1888.

DARLING J. I entirely agree. I confess that I can see no logical reason why that which is a condition precedent under s. 94 of the County Courts Act, 1888, should be a thing which

cannot be done while the action is in the High Court; but that is the effect of the legislation, and it is not our duty to criticize the statute, but to act upon it.

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*Appeal allowed.*

Solicitors for plaintiffs: *Belfrage & Co., for Reece & Harris, Birmingham.*

Solicitors for defendant: *Morse, Simpson & Bowen, for W. H. & A. R. Whitelock, Birmingham.*

P. B. H.

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## THE QUEEN *v.* BOWMAN AND OTHERS, JUSTICES, &c., AND DUNCAN.

1898
*March* 12, 19.

*Licensing Acts—Licence—Excess of Jurisdiction—Certiorari—Mandamus.*

At a general annual licensing meeting an application was made for a licence to sell intoxicating liquors. The justices granted the licence upon the applicant paying to them a sum of money, which money they intended to apply in reduction of the rates of the borough, or for some other similar public purpose. Certain persons, who had appeared before the justices in opposition to the application, then obtained a rule for a certiorari to bring up the licence to be quashed, and also a rule for a mandamus to hear and determine the application for a licence according to law:—

*Held*, that the rule for a mandamus must be made absolute, on the ground that the objectors had a right to be heard before the licensing justices according to law, that the justices in annexing to the grant of the licence the condition of the payment of money shewed that they had allowed their decision to be influenced by extraneous considerations, and that the hearing under such circumstances was equivalent to no hearing at all; but that the rule for a certiorari must, on the authority of *Reg.* v. *Sharman*, ante, p. 578, be discharged on the ground that the grant by licensing justices of a licence to sell intoxicating liquor is not a judicial order.

RULES to justices for the borough of South Shields for a certiorari to bring up an order granting a licence to one John Duncan to sell intoxicating liquors to be quashed, and for a mandamus to hold an adjournment of the general annual licensing meeting and hear and determine according to law an application by the said Duncan for a licence.

At the general annual licensing meeting for the borough of

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South Shields held on August 25, 1897, John Duncan, who was at that time the holder of three licences to sell intoxicating liquors within the borough, applied for a provisional full licence to sell intoxicating liquors on certain premises then about to be erected. The hearing of the application was adjourned to September 29, when Henry Yooll and John George Patton, being inhabitants and ratepayers of the said borough, attended the licensing sessions and opposed the application. At a further adjourned sessions held on November 3 the chairman of the licensing committee stated that the justices had decided to grant the licence on condition of the three existing licences being surrendered and of a sum of 1000*l.* being paid by Duncan to the justices. The conditions having been performed, the licence was granted, and the grant was subsequently confirmed. Messrs. Yooll and Patton thereupon obtained the above-mentioned rules for a certiorari and a mandamus on the ground that the justices in annexing the said conditions to the grant of the licence were acting illegally and outside their jurisdiction.

It was admitted by them that it was the intention of the justices to apply the 1000*l.* so paid by Duncan in reduction of the rates of the borough, or for some other similar public purpose.

*C. A. Russell, Q.C.*, and *R. V. Bankes*, for Duncan, shewed cause. Whether the justices were acting illegally or not in attaching these conditions to the grant of the licence the remedy by certiorari is not applicable, for the grant of a licence is not a judicial order. On this point the case is covered by the authority of *Reg.* v. *Sharman*. (1) The justices at a licensing meeting are not a court at all, *per* Lord Halsbury: *Boulter* v. *Kent Justices*. (2) No doubt they must act in a judicial spirit, as was said in *Sharp* v. *Wakefield* (3), but that does not make them judges. A decision of the General Medical Council must be made in a judicial spirit, but it is not open to be brought up on certiorari. Nor will a certiorari lie to bring up an order of the court of the Company of Thames Watermen granting a licence to act as a waterman or lighterman: *Reg.* v.

(1) Ante, p. 578. (2) [1897] A. C. 556.
(3) [1891] A. C. 173.

*Watermen's Co.* (1) See, too, judgment of Wright J. in *Reg.* v. *London County Council.* (2)

*Crump, Q.C.*, and *Rowsell*, for the justices. A mandamus will not lie in this case, for the justices have already heard and determined. It is conceded by the prosecutors that the justices in demanding the payment of money were acting in the public interest and not from corrupt motives. Further, a mandamus will only issue at the instance of a party aggrieved, which the prosecutors in this case were not. No legal right of theirs has been violated.

*Asquith, Q.C., Blaiklock*, and *H. Howard*, in support of the rules. No attempt has been made to justify the conduct of the licensing justices. Indeed, as far back as 1758, in *Rex* v. *Athay* (3), where a licence was refused because the applicant declined to pay a sum of money which was claimed from him upon a distinct and collateral account, it was laid down that "justices of the peace have no sort of authority to annex any such conditions to the grant of these licences." And the correctness of that proposition has never been questioned. But it has been contended that in the absence of corruption or malice there is practically no remedy for the abuse of authority. No doubt since the case of *Reg.* v. *Sharman* (4) it is not open to argue in this Court that there is a remedy by certiorari, though previously to that case it was the uniform practice to bring up on certiorari orders of licensing justices who had acted in excess of their jurisdiction. Indeed, since the decision of the House of Lords in *Boulter* v. *Kent Justices* (5) (upon which the decision in *Reg.* v. *Sharman* (4) purported to be founded), the Court of Appeal on January 19, 1898, in *Reg.* v. *Thornton* (6) made absolute a rule for a certiorari to bring up a similar order. It must be conceded, however, that the point that certiorari would not lie was not there taken.

Then, as to the mandamus. The prosecutors had a legal right to be heard before the licensing committee. It is true that nowhere in the Licensing Acts is anything to be found

(1) [1897] 1 Q. B. 659.
(2) (1894) 71 L. T. 638.
(3) (1758) 2 Burr. 653.
(4) Ante, p. 578.
(5) [1897] A. C. 556.
(6) (1898) 67 L. J. (Q.B.) 249.

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which defines the status of an objector; but they assume that he has a right to be heard. The object of the requirement that an applicant should give public notice of his intended application is that the public may have an opportunity of coming forward and objecting. Lord Herschell, in *Boulter* v. *Kent Justices* (1), says that "Every member of the local community might object." If that be so, then the prosecutor's right has been infringed. It cannot be said that there has been any real hearing or determination: *Reg.* v. *Adamson*. (2)

WILLS J. This is a case of considerable importance, but it is one which presents no difficulty as soon as the facts (which are not in dispute) are ascertained. It is clear that any member of the public has a right to be heard in opposition to an application for a licence, and, having such a right, he is entitled to be heard according to legal principles. If the justices allow themselves to take into consideration matters which have no bearing upon the merits of the case before them, and which influence their minds in arriving at their decision, it cannot be said that the objector has been heard according to law. In the present case the justices stated that they were prepared to grant the licence upon the terms that the three existing licences then held by the applicant should be surrendered, and that he should further pay to them a sum of 1000*l.* for some public purpose. As to whether the justices were entitled to attach the condition of the surrender of the old licences I will express no definite opinion, though as at present advised I incline to the view that they might lawfully have done so, as the number of the licensed houses which the needs of the neighbourhood demanded was one of the matters which they had to consider. But the condition of the payment of 1000*l.* was wholly unjustifiable. If authority were needed it is enough to refer to the case which was cited of *Rex* v. *Athay*. (3) The justices had no more right to require the payment of money for public purposes than to require that it should be paid into their own pockets. If the attachment of such a condition were allowed to pass without

(1) [1897] A. C. 556, at p. 569. (2) (1876) 1 Q. B. D. 201.
(3) 2 Burr. 653.

objection there would soon grow up a system of putting licences up to auction—a system which would be eminently mischievous and would open the door to the gravest abuses. No doubt the justices were acting in perfect bona fides and in the interests of the public. But their conduct was none the less illegal. There has been no real hearing, and the mandamus must therefore go. With regard to the certiorari, I feel bound by the decision in *Reg.* v. *Sharman.* (1) I do not wish to cast doubt on that decision, but if it had been open to us to consider the question I should have wished to hear the subject more fully discussed before I arrived at the same conclusion. My impression certainly was that the remedy by certiorari had not hitherto been confined within such narrow limits as that case suggests.

DARLING J. I entirely agree. The justices have here done a thing which in a few years' time they may perhaps be allowed to do. They have sought to make vendors of intoxicating liquor, and through them the persons who indulge in it, bear more than their ordinary share of the public burdens. It has often been suggested that a law to that effect would be a very proper one to enact. But it is not law yet. If ever it is made the law it must be by the authority of Parliament, and when Parliament does so enact it will no doubt take care to specify the particular public objects to which the money is to be applied. The justices have here approached the consideration of the case with preconceived theories as to the proper distribution of the unearned increment of value arising from the grant of a licence to particular premises, and have allowed those theories to influence their decision. Under those circumstances it is enough to refer to *Reg.* v. *Adamson* (2) to shew that a mandamus must be allowed. Cockburn C.J. there said, with reference to the refusal of magistrates to issue summonses against persons charged with a conspiracy to commit a breach of the peace at a public meeting: "I think it very probable that they (the magistrates) thought they were doing what was right, and that they were influenced by their distaste for the views and doctrines promulgated at the meeting, and

(1) Ante, p. 578. (2) 1 Q. B. D. 201.

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thought that the sooner the matter was buried in oblivion the better. But these were considerations which ought not to have influenced them at all, and under the circumstances I think they must be taken to have declined jurisdiction." And Field J. said: "If the justices had said, 'We do not believe the evidence,' or given any other reasonable ground for refusing to grant what was asked for, we should not interfere. But I have come to the conclusion that they acted as they did, not because they disbelieved the evidence, but from a consideration apart from the facts, which they ought not to have taken into account." We may apply the same language to what was done here. The justices acted on considerations which they ought not to have taken into account. That being so, they have never heard and determined the case according to law. It makes no difference that the object that they had in view was a laudable one, though it might almost be said of them that "even their failings lean'd to virtue's side." The mandamus must go. As to the certiorari, having been a party to the decision in *Reg.* v. *Sharman* (1), I express no further opinion upon the point.

*Rule absolute for mandamus.*
*Rule for certiorari discharged.*

Solicitors for prosecutors: *Hicks, Davis & Hunt, for A. Robinson, Newcastle-on-Tyne.*

Solicitors for Duncan and for justices: *Ford & Ford, for R. Purvis, South Shields.*

(1) Ante, p. 578.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1898
*March* 14.

## *In re* THE NEW PAR CONSOLS, LIMITED (No. 2).

*Prohibition—Company—Winding-up — Stannaries Court — County Court — Jurisdiction — Committal for Contempt — Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 1, *sub-s.* 6—*Stannaries Court (Abolition) Act*, 1896 (59 & 60 *Vict. c.* 45), *s.* 1.

By the Companies (Winding-up) Act, 1890, s. 1, sub-s. 6, it is provided that every Court having jurisdiction under that Act to wind up a company shall, for the purposes of that jurisdiction, have all the powers of the High Court. The judge of a county court, to which the above-mentioned provision applied, having made an order of committal for disobedience of an order made by him in the course of the winding-up of a company, an application was made for a prohibition to him on the ground that the provisions of Order xxv., r. 40 (*b*), of the County Court Rules, 1889, with regard to service of the order sought to be enforced, had not been complied with, and he therefore had not jurisdiction to make an order for committal:—

*Held*, that, inasmuch as the county court judge was invested for the purposes of the winding-up jurisdiction with the powers of the High Court, a prohibition to him could not be granted.

APPEAL by the official receiver from an order of a judge at chambers directing that a writ of prohibition should issue to the county court of Cornwall as after mentioned.

Proceedings had been taken in the county court for winding up a company called the New Par Consols, Limited, which was formed for the purpose of mining within the Stannaries. In the course of the proceedings an order had been made directing that one Gregory, the respondent, who was a director of the company, should submit and verify a statement of the affairs of the company. This order not being complied with, the county court judge made an order to commit the respondent for disobedience of it. An application was thereupon made at chambers for a prohibition to the county court against any further proceedings on the order for commitment on the ground (inter alia) that the copy of the order sought to be enforced, which was served upon the respondent, was not indorsed with a notice in the form required by Order xxv., r. 40 (*b*), of the County Court Rules, 1889, and that the service of a copy of the

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order so indorsed was a condition precedent to the jurisdiction of the county court judge to make an order for commitment. The judge at chambers made an order for a prohibition. (1)

*The Solicitor-General* (*Sir Robert Finlay, Q.C.*) and *Muir Mackenzie*, for the official receiver. The Companies (Winding-up) Act, 1890, gives to every court having jurisdiction to wind up a company all the powers of the High Court for the purposes of that jurisdiction. Therefore a prohibition to such a court will not lie. If the county court judge has wrongly exercised his jurisdiction in this case, the remedy is by appeal.

[They cited *Reg.* v. *Surrey County Court Judge.* (2)]

(1) By the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 120, "All orders made by the Court of Chancery in England or Ireland under this Act may be enforced in the same manner in which orders of such Court of Chancery made in any suit pending therein may be enforced, and for the purposes of this part of this Act, the Court of the Vice-Warden of the Stannaries shall, in addition to its ordinary powers, have the same power of enforcing any orders made by it as the Court of Chancery in England has in relation to matters within the jurisdiction of such Court, and for the last-mentioned purposes the jurisdiction of the Vice-Warden of the Stannaries shall be deemed to be co-extensive in local limits with the jurisdiction of the Court of Chancery in England."

By the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), s. 1, sub-s. 1, "The Courts having jurisdiction to wind up companies in England and Wales shall be the High Court, the Chancery Courts of the Counties Palatine of Lancaster and Durham, the county courts, and the Stannaries Court." . . . . Sub-s. 6: "Every Court having jurisdiction under this Act to wind up a company shall for the purposes of that jurisdiction have all the powers of the High Court, and every prescribed officer of the Court shall perform any duties which an officer of the High Court may discharge by order of the judge thereof or otherwise in relation to the winding-up of a company."

By the Stannaries Court (Abolition) Act, 1896 (59 & 60 Vict. c. 45), s. 1, sub-s. 1, "On commencement of this Act the Court of the Vice-Warden of the Stannaries shall cease to exist, except for the purpose of continuing and concluding proceedings pending in that court at that date, and as from that date all jurisdiction and powers of the said Court and its officers shall, except as aforesaid, be transferred to and vested in such of the county courts as the Lord Chancellor may by order direct, and be exercised subject to and in accordance with rules of court for regulating the procedure in county courts."

The Lord Chancellor directed that the winding-up jurisdiction of the Stannaries Court should be exercised by the county court having bankruptcy jurisdiction in Cornwall.

(2) (1884) 13 Q. B. D. 963.

*R. G. Glenn*, for the respondent. The county court being an inferior tribunal, the judge, though invested for the purpose of the winding up of companies with the powers of the High Court, can, if he exceeds his jurisdiction, be prohibited. (1)

A. L. SMITH L.J. This is an appeal from an order of a judge at chambers, granting a prohibition to the county court judge against proceeding any further with regard to the committal of a person to prison for not complying with an order of the Court. A company was being wound up in the county court, and an order was made in the course of the winding-up directing the respondent, who had been a director of the company, to furnish certain accounts. A copy of this order was served on him, and the application for the prohibition is based on (among other things) the objection that the copy of the order so served was not indorsed with a notice in conformity with Order XXV., r. 40 (*b*), of the County Court Rules, 1889. It is contended for the appellant that this is not a case in which a prohibition can go; and the question is whether that is so or not. I have no doubt that, this county court judge having jurisdiction in the matter of the winding-up, no prohibition can go to him in respect of the order which he has made in that matter. I turn to the enactment upon which his jurisdiction depends, namely, the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63). Sect. 1, sub-s. 6, of that Act provides that "Every Court having jurisdiction under this Act to wind up a company shall for the purposes of that jurisdiction

(1) It was argued for the respondent that the county court judge had no jurisdiction to make the order of commitment on the ground that the copy of the order sought to be enforced which was served upon the respondent did not bear an indorsement in the form required by Order XXV., r. 40 (*b*), of the County Court Rules, 1889, and also that in certain other respects the provisions of Order XXV. with regard to attachment had not been complied with. It was argued contra that these matters were mere irregularities of procedure which did not go to the jurisdiction, and that the remedy in respect thereof was by appeal, on the ground that the county court judge had wrongly exercised his jurisdiction, not by prohibition on the ground of absence of jurisdiction. As will be seen, it became unnecessary for the Court to decide the points so raised, inasmuch as they held that prohibition would not lie in the case of a county court exercising the powers of the High Court in a winding-up.

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A. L. Smith L.J.

have all the powers of the High Court, and every prescribed officer of the Court shall perform any duties which an officer of the High Court may discharge by order of the judge thereof or otherwise in relation to the winding-up of a company."

By that enactment the county court judge is, for the purpose of winding up companies, invested with all the powers possessed by the High Court in relation to a winding-up, one of which is the power to commit for non-compliance with its orders. I am of opinion that the remedy by prohibition is not available against a county court judge exercising the powers of the High Court in relation to a winding-up; but the proper remedy, if he exercises his jurisdiction wrongly, is by appeal. It follows that the appeal must be allowed.

CHITTY L.J. In this case the county court judge had jurisdiction to wind up the company in question under the Companies (Winding-up) Act, 1890, and the effect of s. 1, sub-s. 6, of that Act is that he has conferred upon him for the purposes of such a winding-up all the powers of the High Court, one of which is the power to commit for disobedience of its orders. That being so, he is, in my opinion, with regard to his exercise of such powers, placed on an equal footing with the High Court, so that a writ of prohibition cannot go to him. That consideration is sufficient to determine the present appeal.

COLLINS L.J. I also am of opinion that the legislation which has been referred to has placed the county court on the same level for the present purpose as the High Court, and therefore a prohibition cannot go.

*Appeal allowed.*

Solicitor for appellant: *Solicitor to the Board of Trade.*
Solicitors for respondent: *Gregory & Co.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1898
*March* 18.

## SUMPTER *v.* HEDGES.

*Contract—Abandonment of Contract—Right to sue on quantum meruit—Building on Defendant's Land—Evidence of New Contract.*

The plaintiff, a builder, who had contracted to erect certain buildings on defendant's land for a lump sum, after he had done part of the work, abandoned the contract, and the defendant thereupon completed the buildings.

*Held*, that the plaintiff could not recover from the defendant in respect of the work which he had done as upon a quantum meruit, there being no evidence of any fresh contract to pay for the same.

*Munro* v. *Butt*, (1858) 8 E. & B. 738, followed.

APPEAL from the judgment of Bruce J. at the trial before him without a jury.

The action was for work done and materials provided. The plaintiff, a builder, had contracted with the defendant to build upon the defendant's land two houses and stables for the sum of 565*l*. The plaintiff did part of the work, amounting in value to about 333*l*., and had received payment of part of the price. He then informed the defendant that he had no money, and could not go on with the work. The learned judge found that he had abandoned the contract. The defendant thereupon finished the buildings on his own account, using for that purpose certain building materials which the plaintiff had left on the ground. The judge gave judgment for the plaintiff for the value of the materials so used, but allowed him nothing in respect of the work which he had done upon the buildings.

*C. J. Peile*, and *G. Thorn Drury*, for the plaintiff. The plaintiff was entitled to recover as on a quantum meruit for the unfinished work of which the defendant took the benefit. *Munro* v. *Butt* (1) is distinguishable, for in that case it does not appear that the defendant had completed the buildings, or done anything from which a new contract could be inferred;

(1) 8 E. & B. 738.

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and his merely retaining his land on which the work not in accordance with contract stood could not afford ground for inferring a new contract.

The case of *Lysaght* v. *Pearson* (1) is in point. In that case the Court of Appeal in a case similar to the present held that the plaintiff could recover.

[They referred to *Whitaker* v. *Dunn.* (2)]

*R. M. Bray, Q.C.*, and *E. Bray*, for the defendant, were not called upon.

A. L. SMITH L.J. In this case the plaintiff, a builder, entered into a contract to build two houses and stables on the defendant's land for a lump sum. When the buildings were still in an unfinished state the plaintiff informed the defendant that he had no money, and was not going on with the work any more. The learned judge has found as a fact that he abandoned the contract. Under such circumstances, what is a building owner to do? He cannot keep the buildings on his land in an unfinished state for ever. The law is that, where there is a contract to do work for a lump sum, until the work is completed the price of it cannot be recovered. Therefore the plaintiff could not recover on the original contract. It is suggested however that the plaintiff was entitled to recover for the work he did on a quantum meruit. But, in order that that may be so, there must be evidence of a fresh contract to pay for the work already done. With regard to that, the case of *Munro* v. *Butt* (3) appears to be exactly in point. That case decides that, unless the building owner does something from which a new contract can be inferred to pay for the work already done, the plaintiff in such a case as this cannot recover on a quantum meruit. In the case of *Lysaght* v. *Pearson* (1), to which we have been referred, the case of *Munro* v. *Butt* (3) does not appear to have been referred to. There the plaintiff had contracted to erect on the defendant's land two corrugated iron roofs. When he had completed one of them, he does not seem to have said that he

(1) Not reported, except in *Times* Newspaper of March 3, 1879.

(2) (1887) 3 Times L. R. 602.

(3) 8 E. & B. 738.

abandoned the contract, but merely that he would not go on unless the defendant paid him for what he had already done. The defendant thereupon proceeded to erect for himself the second roof. The Court of Appeal held that there was in that case something from which a new contract might be inferred to pay for the work done by the plaintiff. That is not this case. In the case of *Whitaker* v. *Dunn* (1) there was a contract to erect a laundry on defendant's land, and the laundry erected was not in accordance with the contract, but the official referee held that the plaintiff could recover on a quantum meruit. The case came before a Divisional Court, consisting of Lord Coleridge C.J. and myself, and we said that the decision in *Munro* v. *Butt* (2) applied, and there being no circumstances to justify an inference of a fresh contract the plaintiff must fail. My brother Collins thinks that that case went to the Court of Appeal, and that he argued it there, and the Court affirmed the decision of the Queen's Bench Division. I think the appeal must be dismissed.

CHITTY L.J. I am of the same opinion. The plaintiff had contracted to erect certain buildings for a lump sum. When the work was only partly done, the plaintiff said that he could not go on with it, and the judge has found that he abandoned the contract. The position therefore was that the defendant found his land with unfinished buildings upon it, and he thereupon completed the work. That is no evidence from which the inference can be drawn that he entered into a fresh contract to pay for the work done by the plaintiff. If we held that the plaintiff could recover, we should in my opinion be overruling *Cutter* v. *Powell* (3), and a long series of cases in which it has been decided that there must in such a case be some evidence of a new contract to enable the plaintiff to recover on a quantum meruit. There was nothing new in the decision in *Pattinson* v. *Luckley* (4), but Bramwell B. there pointed out with his usual clearness that in the case of a building erected upon land the mere fact that the defendant

(1) 3 Times L. R. 602.
(2) 8 E. & B. 738.
(3) (1795) 6 T. R. 320.
(4) (1875) L. R. 10 Ex. 330.

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remains in possession of his land is no evidence upon which an inference of a new contract can be founded. He says: "In the case of goods sold and delivered, it is easy to shew a contract from the retention of the goods; but that is not so where work is done on real property." I think the learned judge was quite right in holding that in this case there was no evidence from which a fresh contract to pay for the work done could be inferred.

COLLINS L.J. I agree. I think the case is really concluded by the finding of the learned judge to the effect that the plaintiff had abandoned the contract. If the plaintiff had merely broken his contract in some way so as not to give the defendant the right to treat him as having abandoned the contract, and the defendant had then proceeded to finish the work himself, the plaintiff might perhaps have been entitled to sue on a quantum meruit on the ground that the defendant had taken the benefit of the work done. But that is not the present case. There are cases in which, though the plaintiff has abandoned the performance of a contract, it is possible for him to raise the inference of a new contract to pay for the work done on a quantum meruit from the defendant's having taken the benefit of that work, but, in order that that may be done, the circumstances must be such as to give an option to the defendant to take or not to take the benefit of the work done. It is only where the circumstances are such as to give that option that there is any evidence on which to ground the inference of a new contract. Where, as in the case of work done on land, the circumstances are such as to give the defendant no option whether he will take the benefit of the work or not, then one must look to other facts than the mere taking the benefit of the work in order to ground the inference of a new contract. In this case I see no other facts on which such an inference can be founded. The mere fact that a defendant is in possession of what he cannot help keeping, or even has done work upon it, affords no ground for such an inference. He is not bound to keep unfinished a building which in an incomplete state would be a nuisance on his land. I am

therefore of opinion that the plaintiff was not entitled to recover for the work which he had done. I feel clear that the case of *Whitaker* v. *Dunn* (1), to which reference has been made, was the case which as counsel I argued in the Court of Appeal, and in which the Court dismissed the appeal on the ground that the case was concluded by *Munro* v. *Butt*. (2)

*Appeal dismissed.*

Solicitor for plaintiff: *Sydney R. Letchford.*
Solicitor for defendant: *G. E. Philbrick.*

E. L.

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[IN THE COURT OF APPEAL.]



## STEPHENSON *v.* GARNETT.

*Practice—Staying Action—Frivolous and vexatious Action—Interlocutory Application in County Court—Subsequent Action in High Court raising same Question.*

In an action in a county court judgment was recovered for a sum of money and costs, but before the costs were taxed the plaintiff agreed, on a representation of the poverty of the defendant, to accept a smaller sum than that for which judgment had been given, and executed a deed releasing the defendant from the judgment debt and costs. Subsequently the plaintiff carried in his bill of costs, and applied to the county court judge for an order to tax, upon the ground that the release had been obtained by misrepresentation. The judge, after hearing evidence, found that the execution of the deed had been obtained by misrepresentation, and made an order that the costs should be taxed, and should be paid together with the balance remaining due under the judgment. The defendant in that action thereupon brought the present action in the High Court for a declaration that he had been released from the judgment debt and costs, and for an injunction to restrain further proceedings to enforce payment thereof:—

*Held*, that as the question raised in this action was identical with that decided by the county court judge upon the interlocutory application, and had been decided by a court of competent jurisdiction, the action ought to be stayed as frivolous and vexatious and an abuse of the process of the Court.

APPEAL from an order of a judge at chambers reversing an order of the district registrar at Leeds.

(1) 3 Times L. R. 602. (2) 8 E. & B. 738.

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The defendant in the present action sued the plaintiff in the Leeds County Court and recovered judgment for 45*l.* 16*s.* 6*d.* and costs to be taxed; but, before the costs were taxed, he agreed to accept 25*l.*, payable by instalments, in settlement of the judgment debt and costs, and executed a deed whereby, in consideration of the payment of 25*l.* by instalments, he released the plaintiff from the judgment debt and costs, and covenanted not to tax the costs nor to take any proceedings under the judgment so long as the instalments were regularly paid.

The release was executed in consequence of representations made by or on behalf of the plaintiff as to his poverty.

The instalments were duly paid; but the present defendant shortly afterwards carried in his bill of costs for taxation upon the ground that he had since discovered that the release had been obtained from him by misrepresentation. The registrar of the county court referred the matter to the judge, to whom application was accordingly made for an order directing the registrar to tax the costs. The plaintiff was present when the application came on for hearing, and the judge, after hearing evidence, came to the conclusion that the release had been obtained by misrepresentation, and directed the registrar to tax the costs, and ordered the plaintiff to pay the amount of the taxed costs, and the balance of the judgment debt, by instalments.

A judgment summons was issued against the plaintiff for non-payment of an instalment, and the county court judge made an order of commitment against him.

The plaintiff thereupon commenced an action in the High Court, claiming in his statement of claim—(1.) a declaration that the defendant had released him from payment of the judgment debt and costs; and (2.) an injunction to restrain the defendant from continuing proceedings or commencing or prosecuting any other proceedings to enforce payment thereof.

The defendant took out a summons that the action and all proceedings therein should be stayed, and the statement of claim struck out, on the ground that they were frivolous and vexatious and an abuse of the process of the Court. The

district registrar made an order to that effect which Phillimore J. at chambers rescinded.

The defendant appealed.

*Longstaffe*, for the defendant. The plaintiff is estopped from alleging that this deed is binding on the defendant. That question was raised before the county court judge and determined by him. The judge had jurisdiction under s. 67, sub-s. 8, of the County Courts Act, 1888 (51 & 52 Vict. c. 43), to set aside the deed; and s. 9 gives him the same jurisdiction as a judge of the High Court in chambers would have in an action in the High Court. A judge of the High Court would have jurisdiction to make an order upon summons similar to that made in the county court in this case: *Eden* v. *Naish*. (1) Even if an action to set aside the deed is the proper mode of proceeding, the plaintiff, not having taken the objection before the county court judge, cannot now take it: *Gilbert* v. *Endean*. (2) A plea of res judicata would therefore succeed, and the Court will on that ground stay or dismiss the action as frivolous and vexatious: *Macdougall* v. *Knight*. (3) Even if there is no estoppel, the Court will not allow the plaintiff to raise again the same question which the county court judge has already determined: *Reichel* v. *Magrath* (4); *Macdougall* v. *Knight* (3); *Remmington* v. *Scoles*. (5) Upon one or other of the above grounds the Court ought to stay the action as frivolous and vexatious and an abuse of the process of the Court.

[*Innell* v. *Newman* (6) and *Rawstorne* v. *Gandell* (7) were also referred to.]

*Compston*, for the plaintiff. The county court judge had no jurisdiction upon an interlocutory application to decide whether the deed of release was valid or not. That issue ought to have been raised in a separate action to set aside the deed: *Gilbert* v. *Endean*. (2) The plaintiff is not estopped from relying upon this deed. There was no issue as to its validity properly raised before the county court judge. There was merely an

(1) (1878) 7 Ch. D. 781.
(2) (1878) 9 Ch. D. 259.
(3) (1890) 25 Q. B. D. 1.
(4) (1889) 14 App. Cas. 665.
(5) [1897] 2 Ch. 1.
(6) (1821) 4 B. & A. 419.
(7) (1846) 15 M. & W. 304.

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interlocutory application to tax the costs, and the question of the validity of the deed came collaterally in question. There is therefore no estoppel: *Duchess of Kingston's Case.* (1) The county court judge not having had jurisdiction to determine the question, the Court will not exercise its inherent jurisdiction to stay the action as vexatious and an abuse of the process of the Court either upon the ground of estoppel or otherwise.

*Longstaffe* replied.

A. L. SMITH L.J. In my opinion the learned judge at chambers ought to have exercised the inherent jurisdiction which he undoubtedly possesses of staying the action on the ground that it is frivolous and vexatious and an abuse of the process of the Court. I do not rest my decision upon the ground that the matter is res judicata, for I do not think it can be said that it is. I put my decision on the ground that the identical question raised in this action was raised before the county court judge upon an application for an order to tax the costs of the action in the county court, and was heard and determined by him. The county court judge had jurisdiction to hear and determine the question upon that application, and it is perfectly clear from the evidence before him that the question there was the same as that now raised in this action, namely, whether the deed of release was obtained by fraud. The plaintiff was present at the hearing before the county court judge, and had every opportunity of putting forward his case. The judge heard evidence upon the question and decided it. The issue now sought to be raised in this action has been determined by a court of competent jurisdiction, and the cases of *Reichel* v. *Magrath* (2) and *Macdougall* v. *Knight* (3) shew that it would be an abuse of the process of the Court to allow a suitor to litigate over again the same question which has been already decided against him. Though the Court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question

(1) (1776) 2 Sm. L. C. 10th ed. p. 713. (2) 14 App. Cas. 665.
(3) 25 Q. B. D. 1.

sought to be raised has been already decided by a competent court. The order of the learned judge must therefore be reversed, and the order of the district registrar restored.

CHITTY L.J. I am of the same opinion. I do not rest my judgment on the ground that the question is res judicata in the strict sense of that term. The jurisdiction which we are now exercising is the inherent jurisdiction of the Court to prevent frivolous and vexatious litigation which the Court considers to be a mere abuse of its process. A county court judge has jurisdiction over his own judgments, and the judge in this case heard evidence as to whether or not the release was obtained by fraud, and the plaintiff was present at the hearing, though he was not assisted by counsel or solicitor. The question raised before the county court judge was identically the same question as that raised in the present action. The judge had jurisdiction in equity under s. 67, sub-s. 8, of the County Courts Act, 1888, to deal with this deed of release on the ground of fraud. He determined that question, and his determination can be explained only on the ground that the release was obtained by fraud. In *Gilbert* v. *Endean* (1) there was a decree by consent in favour of the plaintiff, and subsequently a compromise was come to by which the plaintiff agreed to accept a smaller sum by reason of the defendant's poverty. Malins V.-C. heard a motion for leave to enforce the decree, upon the ground that the compromise was obtained by misrepresentation, and he gave leave, thus in effect setting aside the compromise. This Court affirmed his decision, holding that, though the proper mode was to proceed by action to set aside the compromise for fraud, yet as the Vice-Chancellor had jurisdiction over the original judgment, and as the parties had by their conduct consented to the Vice-Chancellor hearing the motion, objection could not subsequently be taken that the motion ought not to have been heard. That case shews that the county court judge had jurisdiction over his own judgment. Then came the decision in *Remmington* v. *Scoles* (2), which proceeded upon the ground, not that the matter was res judicata, but that the defence was a sham one. The defendant, therefore, ought to

(1) 9 Ch. D. 259. (2) [1897] 2 Ch. 1.

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succeed on this application. The jurisdiction, which is a summary one, ought to be exercised with great caution; but in this case the affidavits, which are unanswered, disclose a clear case of fraud, the plaintiff not having denied in any particular the evidence against him. For these reasons I think that the appeal should be allowed.

COLLINS L.J. I am of the same opinion. I agree that there is a difficulty in bringing this case within the doctrine of res judicata. It is very difficult to say that an interlocutory proceeding, whereby leave to proceed with the taxation of costs under a judgment was obtained, could be made the foundation of a plea of res judicata in an action to enforce the covenants in the deed. It would be very difficult to bring this case within the principles enunciated by Knight Bruce V.-C. in *Barrs* v. *Jackson* (1), principles which are untouched by the reversal of his decision by the Lord Chancellor. (2) But I think we are at liberty to look at what happened before the county court judge; and when I do so I am satisfied that he had jurisdiction to deal with the deed of release upon the application before him. The judge did deal with it and set it aside, and it seems to me that ss. 9 and 67 of the County Courts Act, 1888, gave him jurisdiction to deal with it. Both parties attended before him, and the deed in question was invoked by the plaintiff as an answer to the claim for taxation. The judge heard the evidence and adjudicated upon the question raised. The very same question which is raised in this action was decided by the judge, and that lets in the inherent jurisdiction of the High Court, as appears from the cases which have been cited to us, to stay the action as frivolous and vexatious and an abuse of the process of the Court. In my opinion we are properly exercising that jurisdiction in this case.

*Appeal allowed.*

Solicitors for plaintiff: *Bell, Brodrick & Gray, for Wormald & Atkinson, Leeds.*

Solicitors for defendant: *Ward, Bowie & Co., for Walter & E. H. Foster, Leeds.*

(1) (1842) 1 Y. & C. C. C. 585. (2) (1845) 1 Phill. 582.

A. M.

[IN THE COURT OF APPEAL.]

C. A. 1897 *Aug.* 2. 1898 *Feb.* 7, 8; *March* 11.

SMITH AND OTHERS (OVERSEERS OF THE PARISH OF WORTHING) *v.* RICHMOND (SURVEYOR OF TAXES).

*Revenue — Rating — Market Garden — Glass-houses — "Agricultural Land" — "Buildings" — Agricultural Rates Act*, 1896 (59 & 60 *Vict. c.* 16), *ss.* 1, 5, 6, 9—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 3.

Upon an appeal from Collins and Ridley JJ. (who differed), it was held by Lindley M.R. and Rigby L.J., Vaughan Williams L.J. dissentiente, that according to the true construction of the Agricultural Rates Act, 1896, glass-houses in or on a market garden, if buildings, must be rated as buildings and not as agricultural land.

CASE stated by the Court of Quarter Sessions for the county of West Sussex.

Appeal by the overseers of the parish of Worthing from a decision of the assessment committee of the union of East Preston, in Sussex, under the Agricultural Rates Act, 1896.

The appeal came on for hearing at the General Quarter Sessions for West Sussex on January 7, 1897, when, upon hearing counsel for both sides, and for Robert Piper, an aggrieved ratepayer, that Court allowed the appeal subject to the opinion of the Queen's Bench Division upon the following case:—

(1.) By s. 1 of the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16), the occupier of agricultural land in England is made liable, in the case of every rate to which the Act applies, "to pay one-half only of the rate in the pound payable in respect of buildings or other hereditaments." The deficiency thus arising is to be met by the payment by the Commissioners of Inland Revenue into the Local Taxation Account of a certain annual sum to be determined by the Local Government Board.

(2.) For the purposes of the Act, s. 6, sub-s. 1, requires certain returns to be made to the Local Government Board, and sub-s. 2 is as follows:—

"(2.) For the purpose of the returns, statements shewing the gross estimated rental and rateable value of the agricultural

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land in a parish, and, in the case of any hereditament separately valued which consists in part of agricultural land and in part of buildings or other hereditaments, of each such part, shall be made by the overseers of every parish, and corrected by the assessment committee, and sent to the surveyor of taxes, and be subject to objection or appeal by the said surveyor and overseers before the assessment committee, and the justices in special sessions, and the court of quarter sessions, and subject to the right of any aggrieved ratepayer to be heard upon the said appeal, in such form, within such times, and generally in such manner, and subject to such provisions, as may be prescribed. These provisions shall conform as nearly as circumstances will permit to the existing statutory law respecting valuation lists, as regards notices, rights to inspect and take extracts, the hearing of objections, and otherwise."

(3.) In pursuance of s. 6, sub-s. 3, the Local Government Board, by the Agricultural Rates Order, 1896, have made regulations for the purpose of the Act, which regulations have effect as if enacted in the Act.

(4.) By art. iv. (1.) of the above order it is provided that "the overseers of every parish shall as soon as practicable make, and shall on or before September 7, 1896, send to the assessment committee and to the surveyor of taxes in whose district the parish is comprised statements as follows: . . . . (*b*) If there is any agricultural land in the parish the overseers shall make and send a statement shewing, as regards each hereditament separately valued in the valuation list in force on 20th July, 1896, and consisting wholly or in part of agricultural land, the particulars stated in the said valuation list with regard thereto, and also shewing, with regard to every separately valued hereditament which is partly agricultural land and partly buildings or other hereditaments not being agricultural land, the gross estimated rental and rateable value of the buildings and other hereditaments not being agricultural land."

(5.) By art. iv. (3.) of the above order it is provided that, "subject to what is hereinafter provided in this article and in art. v. as to the value of the buildings and other hereditaments, the separate values of agricultural land and of buildings or

other hereditaments shall be ascertained by dividing the value stated in the valuation list in force on 20th July, 1896, between the agricultural land and the buildings or other hereditaments assessed therewith according to the best estimate the overseers can make; the gross estimated rental of the buildings and other hereditaments, when the buildings are used only for the cultivation of the land, being calculated not on structural cost, but on the rent at which they would be expected to let from year to year if they could only be so used, provided that neither the gross estimated rental nor the rateable value of the whole hereditament shall be altered by the separate valuation of the parts thereof."

(6.) Art. iv. (5) of the above order requires that the statement shall be in the form shewn in Sched. L. to the order.

(7.) By s. 9 of the Act it is enacted as follows: "The expression 'agricultural land' means any land used as arable, meadow, or pasture ground only, cottage gardens exceeding one quarter of an acre, market gardens, nursery grounds, orchards, or allotments, but does not include land occupied together with a house as a park, gardens, other than as aforesaid, pleasure grounds, or any land kept or preserved mainly or exclusively for purposes of sport or recreation, or land used as a racecourse."

(8.) The same definition is incorporated with and set out in art. i. of the above order, and in the Act and order the expression "agricultural land" has the meaning assigned to it in the definition unless the context otherwise requires.

(9.) In pursuance of s. 6, sub-s. 2, of the Act and of art. iv. of the Agricultural Rates Order, 1896, the appellants made statements in the prescribed form, and sent them to the assessment committee of the East Preston Union, and to the surveyor of taxes in whose district the parish of Worthing is.

(10.) In their statements the appellants had, in the case of certain hereditaments separately valued in the valuation lists in force on July 20, 1896, and consisting of land partly covered by glass-houses, inserted the gross estimated rental and rateable value of the whole of such hereditaments under the description of "agricultural land."

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(11.) The assessment committee, on the objection of the surveyor of taxes, decided that the statement to the extent to which it includes land partly covered with glass-houses was incorrect, and corrected it by striking out that entry.

(12.) The appellants appealed against this decision to the court of quarter sessions.

(13.) On the hearing of the appeal, it was agreed, inasmuch as the hereditaments included in the notice of appeal were practically identical in character, to take the hereditament of Robert Piper, numbered 140 in the notice, as a test case for the purposes of the appeal, and it was agreed that such course should be followed on the argument of this case.

(14.) With regard to the last-mentioned hereditament the following were the agreed facts:—

Robert Piper was a grower of fruit, vegetables, and flowers at Worthing, and described himself, and was commonly known, as a market-gardener and nurseryman.

He was the owner and occupier of a piece of land, rather more than four acres in extent, on which fifty-seven glass-houses or greenhouses of various sizes were erected; the houses were used by him for the purpose of growing tomatoes, cucumbers, and grapes, and, to a smaller extent, other vegetables for the purpose of sale. The plants and crops grown therein were watered and heated by artificial means, and grown upon soil placed upon prepared beds inside the houses, and matured much earlier than in the open ground. The vines were planted inside the houses, and the roots ran partly in the soil under the houses, and partly passed through the apertures in the walls into the soil outside. Fifty-one of the glass-houses were thus used for growing vines. In the cucumber houses (which were six out of the fifty-seven houses) there were, inside the houses, dwarf brick walls supporting corrugated iron sheets, upon which sheets earth taken from the other parts of the nursery ground was placed. In this earth so placed upon the iron sheets, the cucumber plants were planted. Beneath the iron sheets, and between them and the ground, there were hot-water pipes.

The area actually occupied by the fifty-seven houses was rather

more than two acres. The rest (rather more than two acres) consisted merely of vine borders, paths, and the stokeholes. The whole of the houses were built upon dwarf brick walls like an ordinary greenhouse.

Paragraph 15 of the case set out a copy of so much of the valuation list and the supplementary valuation list for the parish of Worthing in force on July 20, 1896, as related to this hereditament.

Paragraph 16 set out a copy of so much of the overseers' statement as related to this hereditament in the form in which it was sent to the assessment committee.

(17.) The hereditament to which the above-mentioned portion of the overseers' statement related was identical with the hereditament to which the above-mentioned portion of the valuation list and supplementary valuation list respectively related. Upon the objection of the surveyor of taxes, duly made under the Act, the assessment committee, after hearing all the parties interested, altered the overseers' statement by striking out the whole of the entry, upon the ground that no part of the hereditament in question was agricultural land, and consequently that no part thereof was properly entered in the overseers' statement.

The alteration consisted in striking out, under the heading of "Market Gardens and Nursery Grounds," the number "140," the occupier's name, "Robert Piper," the description of property, "57 greenhouses," the name of property, "Chesswood," the gross estimated rental, "662*l.* 19*s.* 6*d.*," and the rateable value, "431*l.* 5*s.* 0*d.*"; and under the heading of "Agricultural Land," the gross estimated rental, "662*l.* 19*s.* 6*d.*," and the rateable value, "431*l.* 5*s.* 0*d.*"

(18.) Upon the hearing of the appeal before the court of quarter sessions it was contended for the appellants, the overseers, that the particulars of the gross estimated rental and rateable value of the hereditament in question were correctly entered by them in their statement under the heading of "Agricultural Land," and that the decision of the assessment committee to correct the statement by striking out the entry

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was wrong; and in support of their contention they cited *Purser* v. *Worthing Local Board of Health*. (1)

(19.) For the respondent it was contended that the case relied on by the appellants did not decide that the glass-houses were not buildings, but merely that the land was not the less used as a market garden because the glass-houses had been placed upon it, and that moreover the definition of agricultural land in the Agricultural Rates Act, 1896, was to be read subject to the context, and that the context in the Act required that any buildings should be excluded from the term "agricultural land," that the glass-houses were buildings within the meaning of the Act, and that it followed that either the whole of the hereditament in question should be excluded from the overseers' statement, or, alternatively, that so much thereof as consisted of buildings should be inserted under the heading of "Buildings not being Agricultural Land."

(20.) The court of quarter sessions were of opinion that the contention of the appellants was right, and allowed the appeal, and ordered the statement of the overseers to be altered by restoring all the items which formed the subject of the appeal to the condition in which they were before they were altered by the assessment committee, subject to the statement of a case for the opinion of the Court.

(21.) The question for the opinion of the Court was whether the court of quarter sessions were right in ordering the statement to be so altered.

The case was heard before Collins and Ridley JJ. on August 2, 1897.

*Sir R. E. Webster*, *A.-G.* (*S. H. Day*, and *A. H. Trevor* with him), for Richmond, the surveyor of taxes, in support of the appeal. The decision of the court of quarter sessions was wrong, and the glass-houses in question are not entitled to the exemption claimed. What is intended by the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16), to be exempted is agricultural land, as distinguished from buildings. There is nothing to be found

(1) (1887) 18 Q. B. D. 818.

anywhere in the Act indicating that the exemption conferred by s. 1, sub-s. 1, upon agricultural land, as defined by s. 9, is applicable to buildings of any description. On the contrary, where it is intended to confer an exemption on certain buildings under certain circumstances, this is done by express words, in s. 5, sub-s. (*c*), which goes to shew that the exemption now claimed does not apply to any buildings. The other provisions of the Act also support the view that all buildings are to be excluded from the term "agricultural land": see ss. 5 and 6, and the definition clause in s. 9. The sessions appear to have decided on the authority of *Purser* v. *Worthing Local Board of Health* (1), but that case was decided on the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, which is different from the Act now in question, and therefore the decision is not in point. The same observation applies to *London and North Western Ry. Co.* v. *Llandudno Improvement Commissioners* (2), which was decided on a local Act.

*Joseph Walton, Q.C.* (*Clavell Salter*, with him), for the overseers. The express words of s. 1, sub-s. 1, of the Agricultural Rates Act, 1896, confer the exemption thereby created on all occupiers of "agricultural land," as defined by s. 9, and it is clear that the land here in question comes within that definition, for "market gardens" are expressly included. Where buildings are contrasted with land in the Act, it is clear, on reading the different provisions together, that buildings other than those which form a part of what is expressly defined as agricultural land are meant. These structures, though no doubt for some purposes they may be described as buildings, ought for the purposes of this case to be treated as forming a part of the market garden, and therefore entitled to the exemption as "agricultural land." The two decisions which have been referred to strongly support the overseers' contention, for in each of those cases the words of the Act on which the decision proceeded were very similar to those of the Act now in question.

*Alexander Glen*, for Piper, the occupier, claimed the right to appear and be heard, and was heard, under art. 9, rule 3, of the

(1) 18 Q. B. D. 818. (2) [1897] 1 Q. B. 287.

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Agricultural Rates Order, 1896. [He referred to *Guardians of Llandidloes and Newtown Union* v. *Pryce Jones*. (1)]

*Sir R. E. Webster, A.-G.*, replied.

COLLINS J. This case raises the question whether glass-houses used in a market garden are to be treated as buildings, and therefore not entitled to the exemption in favour of agricultural land and market gardens under the definition of agricultural land in the Agricultural Rates Act, 1896. The Court of Quarter Sessions, overruling the decision of the assessment committee, have held that glass-houses are not to be treated as buildings, and that is the question which we have now to decide. I give my opinion with the greatest possible diffidence, as I find my learned brother Ridley J. does not agree with me. However, I have come to a clear conclusion, and I do not think that by taking up any further time in reflection upon the case I should alter my view. [The learned judge read s. 1, sub-s. 1, and the definition of "agricultural land" in s. 9 of the Agricultural Rates Act, 1896, set out ante, p. 685.]

Therefore we find that "agricultural land" means market gardens, and we find that by s. 1 "agricultural land" is to "pay one-half only of the rate in the pound payable in respect of buildings and other hereditaments." Therefore, if the hereditament in question is a market garden, it would seem to follow that it is entitled to the full benefit of the exemption. Now, is or is not the hereditament in question a market garden? The facts stated in the case are these: Robert Piper was the owner and occupier of a piece of land of rather more than four acres in extent, on which fifty-seven glass-houses or greenhouses of various sizes were erected. The houses were used by him as described in paragraph 14 of the case. (2) Therefore, about one-half of the whole area, consisting of about two acres, was covered with glass, built into, or forming part of, the buildings, to the extent described in paragraph 14. Now, with respect to the hereditament, consisting as it did of buildings to the extent described in that paragraph, and

(1) (1881) 44 L. T. (N.S.) 310; S.C. nom. *Reg.* v. *Justices of Montgomeryshire*, 50 L. J. (M.C.) 52.

(2) Ante, p. 686.

with regard to the residue of the land there described, was it or was it not a market garden within the meaning of the definition? It seems to me that a great deal of light, even if one's common sense did not assist one in the matter, is thrown upon the question by the case of *Purser* v. *Worthing Local Board of Health*. (1) That case arose under s. 211, sub-s. 1, of the Public Health Act, 1875, which enacts that "the occupier of any land used as . . . . market gardens or nursery grounds . . . . shall be assessed in respect of the same in the proportion of one-fourth part only of the net annual value thereof." Then the head-note goes on: "The appellant, a market gardener and nurseryman, was the occupier of a piece of land upon which were built sixteen greenhouses or glass-houses, which practically covered the surface of the land; they were built on brick foundations, and were used by the appellant for the purpose of growing fruit and vegetables for sale in the course of his business." In other words, they were buildings precisely of the same class, and serving the same purposes, as the buildings in this case. "*Held*, affirming the decision of the Queen's Bench Division, that the land with the greenhouses upon it constituted a market garden or nursery ground within the meaning of the Act, and that the appellant was liable to be rated to the general district rate in the proportion of one-fourth part only of the net annual value of the property." Day and Wills JJ. gave judgment, and Wills J. makes an observation which I think is exceedingly pertinent to this case. He says: "Gardening operations were carried on in them" (the market gardens and nursery grounds), "and the cultivation of hothouse and greenhouse plants is no less essential a part of these operations than the cultivation of plants which grow in the open air. These are places where operations in the nature of gardening are carried on, and these houses are parts, and necessarily so, of them. I think that such pieces of ground are very properly included under the head of market gardens or nursery grounds. Modern life has increased the relative proportion in them of glass to ground uncovered; but I see no reason why

(1) 18 Q. B. D. 818.

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the ground so occupied should not fall within the exemption." (1) The Court of Appeal affirmed the judgment, Lord Esher M.R. saying: "I think that the land is not the less used as a market garden because these glass-houses have been placed upon it." (2) Now, that Act seems to me to be an Act in pari materiâ, and it was essential there to determine whether or not land, so covered to a great extent with buildings, nevertheless continued to be a market garden, and it was held that it did. It seems to me therefore that, up to this point in the discussion, it must be taken that the land in question here, with these buildings on it, is a market garden, and being such is entitled to exemption. But then the Attorney-General has pressed upon us strongly the other provisions of the Act, chiefly those contained in s. 5. Now, s. 5 says this: "(*a*) Where separate hereditaments are specified therein, the value of agricultural land shall be stated separately from that of any building or other hereditament"; and by sub-s. (*c*): "Where any hereditament consists partly of agricultural land and partly of buildings, the gross estimated rental of the buildings, when valued separately, in pursuance of this Act, from the agricultural land shall, while the buildings are used only for the cultivation of the said land, be calculated not on structural cost, but on the rent at which they would be expected to let to a tenant from year to year, if they could only be so used; and the total gross estimated rental of the hereditament shall not be increased by the said separate valuation." Then, by s. 6, sub-s. 2: "For the purpose of the returns, statements shewing the gross estimated rental and rateable value of the agricultural land in a parish, and, in the case of any hereditament separately valued which consists in part of agricultural land and in part of buildings or other hereditaments, of each such part, shall be made by the overseers of every parish." The Attorney-General says that the effect of this express exclusion of buildings from the benefit given to agricultural land is a cardinal factor in this Act, and, therefore, distinguishes it altogether from the provision of the Public Health Act on which the case I have just referred to was decided;

(1) 18 Q. B. D. at p. 821. (2) 18 Q. B. D. at p. 822.

but when I look to this provision about other buildings I am unable to see that that contention is well founded. It seems to me that the object of introducing "buildings" into sub-s. (*c*) is really for the purpose of giving them a qualified exemption. The provision is, "Where any hereditament consists partly of agricultural land and partly of buildings"—for which I substitute, as the Attorney-General did, "market gardens"—the gross estimated rental of the buildings is to be calculated as I have already stated. The hereditament consists of two things mutually exclusive, one part of it being market garden and the other part being buildings. The Act then goes on to give a certain qualified exemption to buildings coming within the limitations it describes, namely, buildings which "are used only for the cultivation of such land." For those buildings it gives a special exemption, that is to say, that the rate is to be calculated, not on the structural cost, but on the rent at which they would be expected to let from year to year. Now, that exemption explains why the distinction in that section, as between "agricultural land" and "buildings" only, is not "buildings and other hereditaments." The Attorney-General laid stress upon the fact that other hereditaments were not recognised in that section; but the reason is quite obvious when we consider that the object is to give a qualified exemption to buildings which are used for the purpose of a market garden, an exemption within which it would be impossible to bring other hereditaments, such as he has described, and which are properly introduced into sub-s. 2 of s. 6, where there is no such purpose which would render it necessary to distinguish between buildings and other hereditaments. Now, the cardinal ground upon which my opinion is given in this case is, that, where the section is dealing with buildings, it is dealing with something distinct, and excluded out of, "agricultural land," and therefore, if I once come to the conclusion that these hereditaments in question are agricultural land, I am not in the least pressed with the provision as to buildings, because ex hypothesi it deals with something outside that which has already been defined to be agricultural land, namely, a market garden. Now, that such may very properly be the true view I think is to some

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extent supported by the case of *London and North Western Ry. Co.* v. *Llandudno Improvement Commissioners*. (1) There the section of a local Act, upon which the point turned, was, as it seems to me, almost identical in terms with the section of the Public Health Act, 1875, under which *Purser* v. *Worthing Local Board of Health* (2) was decided. The question was whether the railway station came within the exemption, or to what extent, if any, it did come within the exemption. The head-note is: "By the Llandudno Improvement Act, 1854, which authorized commissioners to make annually a general improvement rate upon all property for the time being liable to be rated to the relief of the poor, it was provided that the occupier of any land used only . . . . as a railway should be assessed in the proportion of one-fourth part only of its net annual value." Those words are, as far as I can follow them, identical with the words dealing with railways in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 230. "*Held*, that the platforms at a railway station, and the roof covering the railway, the platforms, and the sidings, might be rated as land used only as a railway under this provision." Now, as was pointed out by Mr. Walton, the first part of s. 68 of that Act contains these words: "The owners and occupiers of houses, buildings, courtyards, and gardens, and all other property, shall be rated at the full net annual value of the same." Then comes the provision which gives immunity to railways: "Provided always that the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market gardens, or nursery grounds, and the occupier of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall, so far as respects the said general improvement rate, be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof." Now, it was held there that structures, which might properly be described as buildings, actually constituted part of the railway, and, being part of the railway, were entitled to the exemption for land used as a railway. A distinction was drawn

(1) [1897] 1 Q. B. 287.

(2) 18 Q. B. D. 818.

in that case between those buildings or structures which were actually part of the railway itself, and those which were used only as ancillary to railway purposes, and certain parts of the station were not brought within the exemption at all. Now, the principle of that case seems to me to confirm the view I have taken of this case, when the facts are examined, and it is found that the particular structures in question are really part and parcel of the subject-matter of discussion, in this case of market gardens. If one once comes to the conclusion that they are market gardens, then, although they are in another sense buildings, they come under the general exemption given to market gardens. If they cannot be properly described as market gardens, but only as buildings used for the purpose of market gardens, then they come within the exemption applicable to buildings. It seems to me that any other view would really defeat the purpose of the Act in question, and the Legislature has thought fit to sweep in market gardens under the exemption in favour of agricultural land. It would be to shut one's eyes to the obvious facts if we were to suppose that market gardens were not to be under modern conditions largely covered by glass. It seems to me, on the grounds I have pointed out, that the buildings in question are really not to be regarded as buildings at all, but are to be regarded simply as part and parcel of the market garden, and as such that the hereditament upon which they stand is entitled to the exemption given by the Act to market gardens.

RIDLEY J. I need hardly say that it is with great hesitation I express an opinion contrary to that which has been expressed by my learned brother, but I have not been able to construe the section in question in the same way as he has. It appears to me that the whole scope of the Act of Parliament is to relieve what is called, and defined as, agricultural land in that Act. We find this in the title of the statute, and in ss. 1, 5, 6 and 9. The intention was that agricultural land, which "means any land used as arable, meadow, or pasture ground only, cottage gardens exceeding one quarter of an acre, market gardens, nursery grounds," and so forth, was to be included

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in agricultural land, and that the occupiers of such land were to be liable to pay one-half only of the rates in the pound payable in respect of the buildings and other hereditaments, that is to say, an occupier of agricultural land, as so defined, escapes the payment of one-half the rate in the pound. The intention, therefore, is to contrast the land which is entitled to the relief from the buildings which are not so entitled. There are no buildings which are so entitled to relief. There cannot be found in the Act of Parliament any suggestion to the effect that any building, as such, is entitled to relief at all. Therefore the state of the law with regard to the buildings, as I think, remains as it was before, with one exception, dealt with in s. 5, sub-s. (*c*). Now, the intention of the Act being, as I have said, and as I am only able to read it, that land should be exempt, but not the buildings, there comes the question with regard to a simple farmhouse and homestead, which must naturally be assumed to be part of every agricultural holding. Those buildings are to be valued, so long as they are used only for the cultivation of the land, not on their structural cost, but only on the rent at which they would be expected to let to a tenant from year to year, if they could only be so used. That is to say, when land is exempted from payment of one-half of the rate, the buildings, as buildings, are not exempted at all, but if those buildings are used only for the cultivation of the land, the amount at which they are to be valued is to be calculated, not on structural cost, but on what a tenant would give who used them in connection with the occupation and cultivation of the farm.

I do not imagine that at the time this Act of Parliament was passed it actually entered the minds of those who were instrumental in passing it that the buildings might stand upon the land itself, which, if they were not there, might have been such land as would have been entitled to the exemption. It is probable that farmhouses and barns were chiefly the buildings which were in contemplation at the time. Those are the buildings which are likely to be used for the cultivation of the land, and which a tenant from year to year would take for the purpose of so using them. But supposing they did stand

upon agricultural land which is entitled to exemption, are they the less buildings? Certainly not. I understand the argument to be, once agricultural land always agricultural land, so that if a farmhouse is put upon the corner of a pasture field it would still be land. Now, is it possible that such was really the intention of those who framed this Act of Parliament? Surely the clear line is between land and buildings, and, if once a building is in existence upon the land as a building, it must be so treated. I am not able to get past that meaning, although I admit that at first when the case was opened the distinction struck me that this case was different from that of the farmhouse, because here the buildings stand upon part of the land which is actually in cultivation, whereas in most instances the ordinary homestead does not stand upon such land; but that distinction nowhere appears in the Act of Parliament. I think myself, assuming the two definitions, of agricultural land and buildings, to be exclusive the one of the other, that when once it appears that the hereditament is a building it ceases to be land. That is what the distinction and scope of the Act is. We find on the one side land distinguished, and entitled to this exemption, and we find all buildings and other hereditaments upon the other, and although my learned brother takes the other view, I am unable to see that, merely because a building stands upon land which would be entitled, if the building were not there, to exemption, the building ceases to be a building. What I think is that, once it is a building that is rateable, it ceases to have the exemption that is given to land. What I do is to look at the language of the Act of Parliament, and see so far as I can what is the proper meaning of it. There is no authority precisely in point, according to my judgment, but there is the case of *Purser* v. *Worthing Local Board of Health* (1), and, with respect to that decision, I can only say that what I have said is not intended in the slightest degree to conflict with it. If I thought it was in conflict, I should have to admit that I was mistaken, but I understand that decision to have been this. The question was, whether a market garden, which had glass-houses built over a large

(1) 18 Q. B. D. 818.

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portion of it, ceased therefore to be a market garden. I do not think anybody would say that it did, and I do not for a moment say that this market garden ceased to be a market garden in so far as it had glass-houses built upon it. A market garden may have glass-houses upon it, or it may not. The only statement in the case with which I find myself partially in disagreement is the observation that market gardens as a rule do have glass-houses. That is an observation as to which I should have hesitated whether I could fairly follow it. The other case quoted, *London and North Western Ry. Co.* v. *Llandudno Improvement Commissioners* (1), was referred to by the Attorney-General, and again I accept the principle of that case. There the decision really does not go beyond this, that the railway includes, not only the line of railway, but the houses, and erections, and platforms necessarily connected with it; but that does not, as it seems to me, shew that a building under the Act now in question is to be called land, which it is not, I think, according to the meaning of this Act. I am sorry to be in conflict with my learned brother in this matter. It is a small matter, but it is a point upon which I have arrived at a conclusion, and I feel obliged to stick to it.

*Order of sessions affirmed.* (2) *Leave to appeal given.*

P. B. H.

The surveyor of taxes appealed.

*Sir R. E. Webster, A.-G., S. H. Day,* and *A. H. Trevor,* for the appellant. Ridley J. having withdrawn his judgment, the appeal is from the decision of Collins J. that the glass-houses in question were not, for the purpose of rating, to be regarded as buildings at all, but were to be regarded simply as part of the market garden, and as such entitled to the benefit of the exemption in favour of agricultural land.

Mr. Piper is the owner and occupier of about four acres of land; on that land fifty-seven glass-houses have been built, which themselves cover about two acres, the rest of the ground being borders, paths, and stokeholes. The gross estimated

(1) [1897] 1 Q. B. 287. (2) Ridley J. withdrew his judgment.

rental is 662*l.* 19*s.* 6*d.*, and the rateable value 431*l.* 5*s.*, and practically the whole value is attributable to the glass-houses, which are clearly "buildings" in the ordinary sense of the word. The appellant contends that they are also "buildings" for rating purposes within the true construction of the Act of 1896.

The 9th section of that Act says nothing whatever about "buildings," and the inclusion of "market gardens and nursery grounds" in the definition of "agricultural land" contained in that section cannot be strained to confer exemption from whole rates upon whatever buildings happen to be upon market gardens or nursery grounds. If there are no buildings upon the market garden, then it will be rated as agricultural land; but, if there are any, they must be rated as buildings. And this is the only reasonable view which can be taken of the various provisions of the Act, which cannot be construed so as to contradict each other. Buildings do not cease to be buildings because they are on market gardens.

Take the case of a farmer occupying thirty acres of land, with a stable, cowshed, and Dutch barn upon it. He pays full rates upon his buildings. Side by side is a market gardener with the same amount of land, one acre of which is covered with glass-houses in the nature of buildings. Why should he only pay half rates upon his glass-houses? The case of *Purser* v. *Worthing Local Board of Health* (1) does not conflict with the contention of the appellant. The learned judge has fallen into error, and the true view of the Act is that which was taken by Ridley J.

*Joseph Walton, Q.C.*, and *Clavell Salter*, for the respondents, the overseers of the parish of Worthing. The object of the exemption from full rating is to encourage the cultivation of land, and the Act does not make two definitions, but defines one class of things only—that which it intends to benefit, namely, "agricultural land." Throughout the Act the contrast is not between "agricultural land" on the one hand, and "buildings" alone on the other, but between agricultural land and "buildings or other hereditaments." So that the first question in this case is not whether the glass-houses are

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"buildings," but whether this land used by Piper as a market garden is agricultural land or not. Primâ facie it is, and it is for the appellants to shew that the glass-houses are not merely buildings, but buildings "not being agricultural land": see Agricultural Rates Order, art. 4, and the Schedule to the Overseers' Statement.

Can it be attributed to the Legislature that their intention was only to benefit primitive market gardens without glass, and to exclude large and well-ordered and improved market gardens from the benefit of the Act. Suppose the glass-houses to be buildings in the ordinary sense of the word, they are buildings within the meaning of the Act. For the test must be not whether the building is substantial, permanent, or costly, but whether it is one which withdraws a portion of the land from agricultural purposes. Taking agricultural land as defined by the Act, the building which is not to have the benefit of the Act must be a structure which takes the land out of cultivation. The respondents ask for the market gardener no different treatment to that which is accorded to the tenant of agricultural land in its ordinary sense. If he has something on his land which withdraws part of it from cultivation, that would be a building within the meaning of the Act. But that which cannot be used apart from the cultivation of the land, which is designed to improve the cultivation of the land, and, as in this case, which makes it, if possible, more of a market garden than it was before, ought not to be treated for rating purposes as a building contrasted with agricultural land and deprived of the benefit to which the latter is entitled.

But at any rate the land outside the houses is agricultural land. Two acres only out of the four are covered with "buildings" (if they are such within the Act). The remaining two acres are borders, paths, and so on. The real highly cultivated part of the garden lies under the glass, and yet as to it the gardener loses the benefit of the Act, and the whole value is put upon the glass. It is submitted that Collins J. took the true view of the Act, and that his decision ought to be affirmed.

*Alexander Glen*, for Piper.

*Sir R. E. Webster*, *A.-G.*, in reply.

Arguments similar to those already reported were also addressed to the Court.

*Cur. adv. vult.*

1898. March 11. LINDLEY M.R. The question in this case is whether glass-houses in or on a market garden are to be rated as buildings or as agricultural land under the Agricultural Rates Act, 1896 (59 & 60 Vict. c. 16). The court of quarter sessions held that the glass-houses ought to be rated as agricultural land. On appeal to the Queen's Bench Division the members of the Court were equally divided, and the appeal was dismissed, but leave was given to appeal to this Court. The glass-houses in question are clearly buildings in the ordinary legal meaning of the word. The case stated leaves no doubt on this point.

The question turns entirely on the true construction of the Act of Parliament (59 & 60 Vict. c. 16). The 9th section contains a definition of agricultural land, but no definition of buildings nor of market gardens or nursery grounds. The Interpretation Act, 1889 (52 & 53 Vict. c. 63), contains, in s. 3, a definition of land; and this word, when used in subsequent statutes, is to include buildings, unless a contrary intention appears. The Interpretation Act, 1889, contains no definition of buildings, market gardens, or nurseries. The 9th section of the Act of 1896 clearly shews that land there cannot possibly mean or include buildings in the early part of the section, for the definition is that agricultural land means any land used as arable, meadow, or pasture ground only. Market gardens and nursery grounds are, however, also declared to be agricultural land, and this is the enactment which gives rise to the difficulty with which we have to deal. The definition in s. 9, however, must not be used to contradict other parts of the Act, or to introduce anomalies which the language of the enacting part of the statute does not justify.

Market gardens and nursery grounds may or may not have buildings upon them. If they have not, no difficulty arises; but if they have, then comes the question, How are those buildings to be rated? To answer this question, we must look to the enacting clauses of the Act of 1896.

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Sect. 1 runs thus: sub-s. 1, "During the continuance of this Act, that is to say, the period of five years after the 31st day of March next after the passing of this Act, the occupier of agricultural land in England shall be liable, in the case of every rate to which this Act applies, to pay one-half only of the rate in the pound payable in respect of buildings and other hereditaments." Then sub-s. 2: "This Act shall apply to every rate as defined by this Act, except a rate—(*a*) which the occupier of agricultural land is liable, as compared with the occupier of buildings or other hereditaments, to be assessed to or to pay in the proportion of one-half or less than one-half," and so on. Now, here we have "agricultural land" used in connection with "buildings and other hereditaments," and, as I think, contrasted with that phrase. Similar language is used in s. 5 and s. 6, upon which so much argument turned. Sect. 5 runs thus: "In every valuation list"—which is a thing perfectly well known to persons conversant with rating—"and in the basis or standard for any county rate"—which is also well understood—"and in any valuation made by the council of a borough or any other council for the purpose of raising the borough or other rate." Then come three sub-sections, (*a*), (*b*) and (*c*)—(*a*), "Where separate hereditaments are specified therein, the value of agricultural land shall be stated separately from that of any building or other hereditament." We shall see the importance of that when we come to sub-s. (*c*). Then sub-s. (*b*): "In every case the total rateable value of the agricultural land in each parish shall be stated separately from the total rateable value of the buildings or other hereditaments in such parish." I do not read the rest of it. Then comes sub-s. (*c*): "Where any hereditament consists partly of agricultural land and partly of buildings, the gross estimated rental of the buildings, when valued separately, in pursuance of this Act"—that refers back to sub-s. (*a*)—"from the agricultural land shall, while the buildings are used only for the cultivation of the said land, be calculated not on structural cost, but on the rent at which they would be expected to let to a tenant from year to year, if they could only be so used; and the total gross estimated rental of the hereditament"—this is the important part of this section—

"shall not be increased by the said separate valuation." Sect. 6 is a very long section, and I will not read the whole of it; but in sub-s. 2 we find this: "For the purpose of the returns" —which are mentioned in the early part—"statements shewing the gross estimated rental and rateable value of the agricultural land in a parish, and, in the case of any hereditament separately valued which consists in part of agricultural land and in part of buildings or other hereditaments, of each such part"—that is the gross estimated rental and agricultural value of each such part, as I understand it—"shall be made," and so on. That shews that there may be some hereditaments which may be separately valued and which consist partly of agricultural land and partly of "buildings or other hereditaments." Now, those sections both of them appear to me to be consistent with the interpretation I have put upon s. 1, and rather to support it than the reverse. I cannot find anything in those sections which assists the view which appears to me to be incorrect.

This express mention of buildings makes the whole statute perfectly clear to my mind, and removes the doubt caused by the use of the words "market gardens and nursery grounds" in s. 9. The only conclusion at which I can arrive is that buildings are not to be treated as agricultural land for rating purposes under this Act of Parliament.

The case of *Purser* v. *Worthing Local Board* (1) does not, in my opinion, assist the Court in construing this Act of Parliament. That case merely shews that a market garden primâ facie includes the buildings upon it used for market garden purposes. To urge that market gardens and nursery ground do not cease to be so because they are more or less covered with glass-houses is to urge what is quite true, but is beside the mark. The question is, How are such houses to be rated under this Act of Parliament? My answer is, if they are buildings, they must be rated as such, and not as agricultural land. Mr. Salter, in his very able argument, suggested that buildings used only for covering land which was cultivated under their protection ought to be distinguished from other buildings, and ought to be held to be agricultural land. I can find nothing to justify a

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distinction between one class of buildings and another for any such purpose as his argument requires. Sect. 5 speaks, no doubt, of buildings used only for the cultivation of land, but this clause in no way shews that such buildings or any others are to be rated as agricultural land. The case of *London and North Western Ry. Co.* v. *Llandudno Commissioners* (1) turned on the construction of a provision in another Act of Parliament, and does not really assist me to arrive at the true interpretation of the statute with which we have to deal. In my opinion, the appeal must be allowed and the orders of the Queen's Bench Division and of the quarter sessions must be reversed, with costs here and below.

RIGBY L.J. The question to be determined in this case is in substance whether "buildings" within a market garden are to have the benefit of the partial exemption from rates provided for by the Act in favour of "agricultural land" as defined by the Act.

It will be convenient to take a general view of the Act, distinguishing first of all those parts of the Act which are relevant to the question of exemption from those which are not, and then dealing with the relevant parts. The relevant parts seem to me to be s. 1, sub-s. 1, s. 5, and s. 9. The other sections are either merely formal, or concerned only with the way in which the deficiency caused by the partial exemption of agricultural land is approximately to be made up, or compensated for, by an annual grant to be fixed once for all, and to be paid in manner pointed out in detail during the period prescribed by the Act.

Of course there might have been in some of these sections, or in the order made by the Local Government Board, which is to be read as part of the Act, some provisions, or expressions, throwing light upon the construction of the Act as to the exemption; but after a careful examination both of the remaining sections and of the order, I have not found anything (unless possibly the clause of s. 6 referred to by the Master of the Rolls) in any of them to help me materially in the determina-

(1) [1897] 1 Q. B. 287.

tion of the question before the Court. At any rate, I have found nothing that is calculated to throw any doubt upon the conclusion at which I have arrived from a consideration of the sections specifically referred to. Now, s. 1, sub-s. 1, is the clause of the Act which gives the partial exemption, and of course the real question is as to the meaning of that clause.

Sect. 5 is the section providing for changes in the law of rating necessary for giving effect to, and defining more particularly, the exemption given by s. 1, sub-s. 1.

Sect. 9 is the interpretation clause, and so far as it defines the expression "agricultural land" it is of great importance, as of course we have to deal not with agricultural land in any merely common or popular sense, but with the meaning of it as explained and defined in the interpretation clause. We must, however, throughout bear in mind that the interpretation clause is not absolute, but ceases to be applicable wherever the context otherwise requires—that is to say, is inconsistent with the literal application of the portion of the interpretation clause under immediate consideration.

I will, in the first place, try how far it is possible to arrive at a reasonably clear construction of s. 1, sub-s. 1, and s. 5, without knowing precisely what is included under the expression "agricultural land."

The important words in s. 1, sub-s. 1, are: "The occupier of agricultural land in England shall be liable, in the case of every rate to which this Act applies, to pay one-half only of the rate in the pound payable in respect of buildings and other hereditaments." Here we find an exhaustive mention of all rateable hereditaments. They are separated into two (apparently mutually exclusive) classes, "agricultural land" forming one class, and "buildings and other hereditaments" the other. The agricultural land, whatever that may mean, is to have the benefit of the exemption, and that exemption is measured by being fixed at one-half of the rate in the pound payable in respect of buildings and other hereditaments. The sentence is only intelligible by observing and acting upon the plain assumption that what I may call the full rate is a

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uniform rate payable equally in respect of "buildings and other hereditaments" not being "agricultural land."

It is impossible, I think, to avoid the conclusion that the word "buildings" here includes all rateable buildings whatsoever; and, if that is so, we have at once with reference to the expression "agricultural land" a context which must modify any part of the interpretation clause which literally applied would give a different and less extensive meaning to the word "buildings" as here used. That extensive meaning plainly involves that "agricultural land" as here used cannot have any buildings upon it.

Before dealing with the language of s. 5 it may be observed—(1.) that in fixing the basis, or standard, for a county rate, the rateable value of each parish as a whole is taken without specifying the value of separate hereditaments in the parish; and (2.) that in valuation lists (except, I suppose, in the possible case of an entire parish being in the occupation of one person, if that really be an exception) separate hereditaments are specified, though, independently of this Act, there is in general no necessity for dividing up, and separately specifying, the parts of the hereditaments in the occupation of a single occupier. The holding by the same occupier of, say, two or more farms, though held under different landowners, might have been treated as a single hereditament without any subdivision.

These observations being borne in mind, we find that s. 5 expressly includes in the opening words every valuation list, and—to go no further—every basis or standard for a county rate.

Sub-s. (*a*) deals with every valuation list where separate hereditaments are specified. It has hitherto been sufficient to value the whole of any hereditament separately specified; you must henceforward state the value of the agricultural land part of the holding separately from that of any building or other hereditament. It does not say you shall separately specify as different hereditaments agricultural land and buildings on the hereditaments.

It is an alteration in the law of rating introduced for the

purpose of ascertaining the extent of the exemption given by s. 1, sub-s. 1.

Except so far as the law is expressly changed it remains as it was before, and it seems to me that the strictly proper course would be to specify as a whole the land, say a farm, or it might be two or more farms, in the occupation of one occupier, giving of course the rateable value of the whole, and then to superadd what is for the purposes of this Act wanted—that is to say, the value of the agricultural land comprised in the holding separately from the value of the rest of the holding.

As the provision is for the purpose of carrying out s. 1, sub-s. 1, the terms "agricultural land" and "any building" ought to mean the same as the like expressions used in that clause of the Act; but I would point out that it seems impossible to read the expression "or any building" here used as equivalent to "any building not standing on the agricultural land spoken of." The case here is even more clear than that of s. 1, sub-s. 1, and strongly corroborates the view above given as to the meaning of that clause.

Sub-s. (*b*) of s. 5 includes everything included in (*a*), and also the cases in which no separate hereditaments are specified.

Sub-s. (*c*) deals with every case of a hereditament consisting in part only of agricultural land.

I see no difficulty whatever in the wording of the section.

On the interpretation above given of sub-s. (*a*), or even I think without it, the total gross estimated rental of the mixed hereditaments will in every case be known, or can at once be ascertained by the simplest arithmetical calculation.

In my judgment, s. 5 strongly corroborates the conclusion already arrived at from the consideration of s. 1, sub-s. 1, namely, that all buildings whatsoever are to be put on the one side, and only agricultural land without buildings on the other.

Going now to the interpretation clause (s. 9), and dealing in the first place with what may be called the more general part of the definition contained in the words "any land used as arable, meadow, or pasture ground only," it seems to me reasonably clear that these words of their own force exclude any land which has any building upon it.

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However useful a farmhouse and farm buildings may be in connection with arable, meadow, or pasture, they cannot, I think, in any reasonable sense of the words, be said to be land used as arable, meadow, or pasture ground only.

The same observation would apply equally to buildings of minor importance, such as a cart-shed, a barn, or a cattle-shed standing in, and held with, an inclosure the rest of which may be arable, meadow, or pasture. It would be straining language very much to say that any one of these, however useful for the purposes of the adjoining arable, meadow, or pasture, is itself used as arable, meadow, or pasture ground only. So far from any buildings being included in this part of the definition, they seem to me to be purposely and deliberately excluded.

Then come the extensions of the previous definition to special cases where it might be doubtful whether they were already included, and among others to the special case of "market gardens."

Now, assuming as I do that without a context, or with a different context, "market garden" may include the whole area of a holding held for market-gardening purposes, including the site of any buildings, the question is what it means in this context.

I do not see on what reasonable ground the policy of excluding from agricultural land any buildings whatsoever (which down to the present point is in my judgment satisfactorily made out) should suddenly be treated as abandoned, and replaced by a policy of including what may (as in the present case) practically amount to by far the greater and more valuable part of the holding, with the result of giving the exemption provided for by the Act to buildings of greater extent and value than would be found upon many farms.

If "market garden" necessarily involved buildings, there might be more difficulty in the matter; but there may be a market garden without buildings, and it is not necessary to assume that a market garden with buildings was intended.

At any rate, if the construction which I have given to s. 1, sub-s. 1, and s. 5 (*a*), is correct, then the context will shew that "market garden" when introduced into those sections

must be interpreted as market garden so far as it is without buildings.

It would be contradictory to say that in s. 1, sub-s. 1, the occupier of a market garden with buildings thereon shall pay one-half only of the rate in the pound payable in respect of all rateable buildings; and a similar observation would apply with not less force to the corresponding passage or passages in s. 5.

Finding, as in my opinion I do find, in the Act itself a sufficient ground for the construction at which I have arrived, I do not think it necessary or even legitimate to inquire how other statutes differently worded have been construed. I will only say that in s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, on the construction of which *Purser* v. *Worthing Local Board* (1) was determined, not only is there an absence of the antithesis between "agricultural land" and "buildings," which is the very foundation of the present Act, but the word "buildings" is not even used at all.

VAUGHAN WILLIAMS L.J. I regret to say that I differ with the other members of the Court. I think that the judgment of Collins J. was perfectly right. The Act is very difficult to construe; there seems to me no construction which does not lead to results which it is difficult to suppose the Legislature could have intended; and in such a case one must in my judgment be guided by the words of the section, and not by balancing the difficulties of the results one against the other.

The question in this case is whether that part of the land occupied as a market garden which is covered with glass-houses of the character stated in the case comes within the exemption mentioned in s. 1, sub-s. 1, of the Agricultural Rates Act, 1896, so as to render the occupier liable to pay one-half only of the rate in the pound payable in respect of buildings and other hereditaments. I think that the land in question does fall within the exemption. I agree with Collins J. that the cases of *Purser* v. *Worthing Local Board* (1) and *London and North Western Ry. Co.* v. *Llandudno Commissioners* (2) shew that, prima facie, this land covered with these glass-houses is

(1) 18 Q. B. D. 818. (2) [1897] 1 Q. B. 287.

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part and parcel of the market garden, and therefore agricultural land, the occupier of which is entitled to the benefit of this exemption.

The form and collocation of words used in this Act are not new as defining partial exemption in rating cases. They are to be found as early as the Public Health Act, 1848, and in the Public Health Act, 1875. They seem to have been frequently used in local Acts, and have uniformly received such a construction that the hereditaments catalogued in the definition have been held to include the buildings thereon whenever the buildings in question are part and parcel of the specified hereditament. The buildings in such case are treated as being practically incapable of beneficial occupation independently of the defined hereditament. It remains to consider if there is anything in the tenour and details of this Act to lead to the conclusion that "market gardens" and the other collocated words, "cottage gardens exceeding one quarter of an acre, . . . . nursery grounds, orchards, or allotments," ought to receive a different construction in this Act, so as to exclude from agricultural land the buildings on each hereditament whatever their character. I see nothing in the tenour of the Act, or in its details, sufficient to lead to such a conclusion; and if it had been the intention of the Legislature, when employing this old precedent for the definition of hereditaments to be partially exempted from rates, to use the words in a new sense and exclude from the exemption all land covered with buildings, it would have been very easy to do so, and this has not been done.

I will now deal with the sections chiefly relied on in arguments at the bar as indicating an intention by the Legislature to use these words in this new sense. Sect. 1, sub-s. 1, says, following the words at the beginning of the section, "shall be liable, in the case of every rate to which this Act applies, to pay one-half only of the rate in the pound payable in respect of buildings and other hereditaments," which the occupier of agricultural land is liable, as compared with the occupier of buildings or other hereditaments, to be assessed to or to pay in proportion of one-half, or less than one-half.

It is argued that in this section and sub-section there is a

manifest intention to contrast agricultural land with buildings—that is, with the buildings thereon. I think not. There is a contrast, but it is a contrast between "agricultural land" as defined, and "buildings and other hereditaments"—a contrast, that is to say, between different classes of rateable hereditaments. The right inference from this contrast seems to me, not to be that all buildings are to be excluded from agricultural land, but only such buildings as can by the existing law properly be dealt with for rating purposes as separate hereditaments.

Next it is argued that s. 5 shews an intention to exclude all buildings from "agricultural land." I think not. It is a difficult section to construe, but it seems to me to be a section giving directions as to the separation in valuation lists and the bases of county rates, &c., of agricultural land as a rateable hereditament from buildings and other rateable hereditaments. Clause (*a*) deals with lists specifying the separate hereditaments in detail, clause (*b*) with lists dealing only with totals; clause (*c*) deals with the entry in the detailed valuation lists of the rateable hereditaments which form parts of a hereditament consisting partly of agricultural land and partly of buildings; that is, in my opinion, buildings which ought by (*a*) to be rated as separate rateable hereditaments. Clause (*c*) itself says "rental of buildings when valued separately in pursuance of this Act from the agricultural land," and the only provision providing for such a separate valuation is clause (*a*) of this s. 5. Both the agricultural land and the hereditament consisting of buildings will each of them appear in the valuation list as separate rateable hereditaments. The entire hereditament of which they are parts will not appear in the valuation list at all. The rateable value of each of these parts, together with the respective gross estimated rental, will have to appear in the valuation list; for the rateable value is the gross rental less certain deductions, which rental and deductions have by law both to appear on the valuation list.

The clause says that the gross estimated rental of the building shall, while the buildings are used only for the cultivation of agricultural land, be calculated on the rent at which they would

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be expected to let to a tenant from year to year, and not on structural cost. This at first looks like a very useless direction, since the rent to be expected from the hypothetical tenant, and not structural cost, is always the basis of valuation in rating. But the section goes on to say that the total gross estimated rental of the entire hereditament shall not be increased by the separate valuation of the parts. This shews that the valuer, in addition to making a separate valuation of the rateable hereditament consisting of buildings, must make a valuation of the gross estimated rental of the entire hereditament—which latter valuation will, however, not appear in the valuation list at all; and then apparently he is to deduct from the gross rental of the entire hereditament the value of the rateable hereditament constituted by the buildings, and the gross estimated rental of the agricultural land will apparently be the residue. Then, from the gross rentals of these several hereditaments constituted by the agricultural land and the buildings respectively, will have to be made the ordinary deductions for repairs, &c., to arrive at the rateable value. This latter part of the section, and the dual valuation which it necessarily imports, makes intelligible the portion relating to valuing, not on the structural cost, but on the rent which the hypothetical tenant might be expected to give; because, however plainly this may be the course to pursue according to the ordinary law, it is not so clearly the course to pursue when the Legislature directs that the value of a hereditament shall be ascertained in reference to the gross rental of an entirety, of which the hereditament to be valued is only a part—that is, in other words, in a case where the valuation is arrived at partly by the apportionment of the sum of another and larger valuation.

Now, what are the buildings which are to be separately valued according to these directions in clause (*c*)? Collins J. thought that they are buildings not part and parcel of the agricultural land—not part and parcel, that is, in the present case, of the market garden, but used in connection with it—and no doubt such buildings, although not forming part of the market garden or other agricultural land, might in rating law be described as a part of a hereditament consisting partly of agricultural land

and partly of buildings; for there is no law which requires a separation of hereditaments according to the titles under which the occupier holds, or the use which the occupier makes of the parts; and unity of personal occupation and unity of parish are all that is necessary to constitute and determine the rating hereditament; and if once you arrive at the conclusion that the definitions of agricultural land cover and include the buildings part and parcel thereof, it is not easy to avoid the conclusion that the buildings spoken of in this section must be some buildings other than those falling within the definition. One mode of avoiding this conclusion would be to read the words "partly of agricultural land and partly of buildings" to mean partly of agricultural land uncovered with buildings, and partly of agricultural land covered by buildings; but this would be a somewhat violent construction, and in my opinion it cannot be accepted as the true construction; nor can I bring myself to think that if, apart from s. 5, the definition of agricultural land or of market gardens ought to be construed as including the buildings erected on the land for the cultivation of it, the provisions of s. 5 which can be construed consistently with such construction ought to make one reject it. Moreover, I do not think that to read clause (*c*) of s. 5 as applying only to hereditaments not part and parcel of the agricultural land leads to any result inconsistent with the apparent intention of the Legislature; for, supposing some building to have been erected which, in addition to its use in assisting the cultivation of the agricultural land, would serve another purpose—for instance, a house which would serve as a residence for the farmer and his family—I do not think that there is anything in the cases which would necessitate or justify holding such a building to be part and parcel of the agricultural land, although it would clearly be part of a hereditament consisting partly of agricultural land and partly of buildings. It would, however, be, according to the general law of rating, a single hereditament because occupied under one occupation by the same person or persons. On the other hand, a hay-barn in a meadow, or a cowshed, would be part and parcel of the agricultural land as serving the cultivation thereof, and nothing else. I understand the decision

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in the *Llandudno Case* (1) to have been based on this principle. It is more reasonable to suppose that the Legislature intended such a result, than to put a construction on the Act which necessitates treating a hay-barn or a cowshed as a rateable hereditament separate from the agricultural land and capable of separate beneficial occupation. I think, therefore, that the conclusion of Collins J. is right, and that s. 5, clause (*c*), only applies to buildings outside the definition of agricultural land, and gives a qualified exemption to such buildings while used only for the cultivation of land, and that there is nothing in this section to prevent the definition of agricultural land being read in accordance with previous decisions.

Sect. 6 only deals with the returns to the Local Government Board, and seems to me to follow exactly the lines of s. 5 and clause (*c*), and throws no further light on the construction of the definition clause.

The only remaining section which throws any light on the matter is the 9th section, which contains the definition. I have already dealt generally with the words of the definition, and judicial decision thereon so far as the old precedent has been followed; but some index to the meaning of the Legislature is to be gathered from the words of the definition itself—both those which appear in the old form, and those which are supplementary to it. First, there is the word "only," which qualifies "arable, meadow, and pasture ground," and nothing else in the catalogue. If you treat the word "only" as intended to exclude buildings on such land from agricultural land as defined, and from the benefit of the exemption, then it would seem to follow that in the case of market gardens, &c., buildings will not be excluded; but I do not think that the word "only" affects the question of the inclusion or exclusion of buildings from the definition. "Only" is meant to cover and exclude that class of cases in which the land, although used as arable, meadow, or pasture ground, might be used for some other ultimate purpose, and does not, in my judgment, cover the use of arable, meadow, or pasture ground as the stables in which horses or cows shall stand, or a hay-barn in which the hay shall be stored, such user being merely means

(1) [1897] 1 Q. B. 287

to the user of the arable, meadow, or pasture ground as such. As to the words "but does not include land occupied together with a house, as a park, gardens other than as aforesaid" and so on, I think "other than as aforesaid" means other than market gardens and cottage gardens; and it might be argued that the definition of agricultural land does include land occupied, together with a house, as cottage gardens or market gardens. If this is so, it is difficult to suppose that the Act meant land occupied, together with a house, as arable, meadow, or pasture ground, not to fall within the definition of agricultural land.

The conclusion at which I have arrived on the question raised by the case, namely, whether that part of the land occupied as a market garden which is covered with glass-houses of the character stated in the case comes within the exemption mentioned in s. 1, sub-s. 1, of the Agricultural Rates Act, 1896, so as to render the occupier liable to pay one-half only of the rate payable in respect of buildings and other hereditaments, is that such land does come within the exemption, because these buildings are part and parcel of the market garden which by the terms of the definition is agricultural land, and are buildings used for the purpose of the cultivation of the agricultural land, and for no other purpose. I think, therefore, that this appeal should be dismissed, and that the judgment of the Queen's Bench Division and the court of quarter sessions ought to stand.

*Appeal allowed.*

Solicitors: *The Solicitor of Inland Revenue; Ravenscroft, Hill & Woodward, for Melvill Green & Charles, Worthing; Herbert B. Bell.*

W. W. K.

C. A.

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*Jan.* 25;
*March* 25.

[IN THE COURT OF APPEAL.]

## BRYANT *v.* HANCOCK & CO., LIMITED.

*Lease—Covenant, Construction of—"Assigns"—Underlessee—Lease of Public-house—Licence.*

The lessee of a public-house covenanted with his lessor, the plaintiff, that he, his executors, administrators, or assigns would not wilfully do or suffer any act or thing which might be a breach of the rules and regulations established by law for the conducting of licensed public-houses, or be a reasonable ground for the withdrawing or withholding of all or any of the licences for the sale of beer and ale, wine, and spirituous liquors therein. The lessee assigned the term to the defendants, who underlet the premises. The underlessee committed an offence against the licensing laws, the result of which was that the renewal of the licences was refused. In an action for breach of the covenant:—

*Held*, that the term "assigns" in the covenant did not include an underlessee, and that the defendants were not liable for a breach of the covenant in respect of the offence committed by their underlessee.

APPEAL of defendants from judgment of Lawrance J. at the trial before him without a jury.

The action was brought for breach of the after-mentioned covenant, contained in a lease of a public-house called the Princess Royal, at Grangetown, near Cardiff.

By lease, dated October 16, 1874, the plaintiff demised the public-house for a term of twenty-one years to John Biggs, who (inter alia) covenanted as follows: and further that he, the said John Biggs, his executors, administrators, or assigns, should not nor would at any time during the continuance of the term convert the demised premises into a private house, nor use or suffer the same to be used for any other purpose than as a licensed public-house for the sale of ale, beer, wines, and spirituous liquors, and should and would keep the same open every lawful day, and conduct the business in a proper and orderly manner so as to afford no ground or pretence for discontinuing the licences thereof; and would not wilfully do or suffer any act or thing which might be a breach of the rules and regulations established by law for the conducting of licensed public-houses, or be a reasonable ground for the withdrawing

or withholding of all or any of the licences for sale of beer and ale, wine, and spirituous liquors therein; and should and would from time to time during the continuance of the said term apply for and do or cause to be done all and whatsoever should be requisite for obtaining the renewal of such licences, and would at the end or other sooner determination of the said term forthwith deliver up the same licences in full force to and for the benefit thenceforth of the lessor, his executors, administrators, or assigns, or the incoming tenant of the said premises, or as he or they might direct, and for that purpose, if required, should appear personally before the justices, and sign, execute, deliver, give, and do all such consents, transfers, acts and things as might be requisite for procuring a transfer of the same to the lessor, his executors, administrators, or assigns, or to whom he or they might direct.

On March 31, 1890, Biggs assigned the residue of the term to the defendants. The defendants underlet the premises for a short portion of the term vested in them to Mrs. Evans. Mrs. Evans was charged before the magistrates with and convicted of having on one occasion permitted drunkenness on the premises. Application was made at the next general annual licensing meeting for a renewal of the licences in respect of the premises, but the justices refused to renew them on the ground that Mrs. Evans had been convicted as before mentioned. There was an appeal to quarter sessions against the refusal of the justices to renew the licences, but it was unsuccessful.

The learned judge gave judgment for the plaintiff for 5300*l.* damages.

*B. F. Williams, Q.C.*, and *Arthur Lewis* (*S. T. Evans* with them), for the defendants. There was no breach of the covenant by the defendants. The covenant is that the lessee, his executors, administrators, or assigns, will conduct the business in a proper and orderly manner so as to afford no ground for discontinuing the licences, and will not wilfully do or suffer anything which may be a reasonable ground for withdrawing or withholding the licences. The first part of the covenant relates to the forfeiture of existing licences only, and has no

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application to the present case. The second part of the covenant is not "wilfully" to do or suffer anything which might be a reasonable ground for a refusal to renew the licences. The sub-tenant of the defendants is not an "assign" within the covenant, and the defendants themselves cannot be said to have wilfully done or suffered that which they knew nothing about and had nothing to do with themselves.

There was no breach of the third part of the covenant, by which the defendants were bound to do everything requisite to obtain renewal of the licences.

*Abel Thomas*, *Q.C.*, and *W. Tudor Howell*, for the plaintiff. There was a breach of the first covenant, namely, the positive covenant to carry on the business in a proper and orderly manner so as not to afford any ground for discontinuing the licence. The term "discontinuance" is as applicable to non-renewal of a licence as to forfeiture of it, and the defendants as assignees of the term being bound by the covenant to carry on the business in a proper way are responsible for the conduct of it otherwise by their sub-tenant. It is submitted that the covenant as to not wilfully doing or suffering anything which may be a breach of the licensing laws or a reasonable ground for the withdrawing or withholding of the licences is a separate independent covenant, and that there has been a breach of that also. The term "assign" in that covenant includes a sub-lessee: *Taite* v. *Gosling* (1); *Beardman* v. *Wilson*. (2) The defendants suffered a breach of the licensing laws to be committed, which was a reasonable ground for withholding the licences, through their sub-tenant. The word "wilfully" in the covenant does not mean that there must be a wilful doing or suffering of the act or thing which is an offence against the licensing laws on the part of the lessee or his assignees themselves, but merely conveys that there must be a mens rea on the part of the person who actually commits the offence, which is only what has been held with regard to the word "suffer" in the provisions of the Licensing Acts themselves: *Somerset* v. *Hart* (3); *Bond* v. *Evans*. (4)

(1) (1879) 11 Ch. D. 273.
(2) (1868) L. R. 4 C. P. 57.
(3) (1884) 12 Q. B. D. 360.
(4) (1888) 21 Q. B. D. 249.

[They also cited *Wooler* v. *Knott* (1) ; *Fleetwood* v. *Hull.* (2)]

*B. F. Williams, Q.C.*, in reply. If the contention for the plaintiff is correct the second part of the covenant would have no meaning at all, as everything would be included in the first.

*Cur. adv. vult.*

March 25. A. L. SMITH L.J. read the judgment of the Court (Lord Halsbury L.C., A. L. Smith L.J. and Collins L.J.) as follows:—In this case the plaintiff sues the defendants for breach of covenant, and has recovered damages to the amount of 5300*l.* The defendants appeal upon the ground that upon the true construction of the covenant sued on, when applied to the proved facts of the case, no breach thereof has been committed by them. The material facts are these. By lease dated October 16, 1874, the plaintiff demised to John Biggs and his assigns the Princess Royal Hotel, at Grangetown, near Cardiff, for a term of twenty-one years. Upon March 31, 1890, Biggs assigned to the defendants the residue of the term granted by the lease of October 16, 1874, and it is not disputed that the defendants as assignees became liable to the covenant sued on by the plaintiff. After the defendants had entered into possession of the hotel as such assignees, they let the same to a Mrs. Evans as tenant for a short part of the term vested in them. Mrs. Evans thus became under-tenant to the defendants, and in our opinion it cannot be said that she became an assign of either Biggs or the defendants within the meaning of the covenant sued on. It has been held that an assurance for a period less than the whole term is an underlease and not an assignment: *Cottee* v. *Richardson* (3) ; though an assurance purporting to be an underlease, but which comprises the whole term, may be an assignment: *Langford* v. *Selmes* (4) ; *Beardman* v. *Wilson.* (5) It has also been held that a covenant not to assign is not broken by the granting of an underlease: *Crusoe* v. *Bugby.* (6) In the case of *Taite* v. *Gosling* (7) Fry J. held

(1) (1876) 1 Ex. D. 124, 265.
(2) (1889) 23 Q. B. D. 35.
(3) (1851) 7 Ex. 143.
(4) (1857) 3 K. & J. 220.
(5) L. R. 4 C. P. 57.
(6) (1771) 3 Wils. 234.
(7) 11 Ch. D. 273.

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that a lessee for a term of ninety-nine years could take advantage as an assign of mutual covenants where the assignees of a covenantee were to have the same benefit as the covenantee had. This is a very special case upon the particular meaning of the word "assign" in the particular covenant, and does not trench upon the well-known distinction between an underlessee and an assignee. Mrs. Evans whilst tenant to the defendants as above mentioned upon one occasion permitted drunkenness to take place upon the premises. It is not in our judgment necessary to go through the many steps in the litigation which then took place; it is sufficient to say that it is clear that the defendants took all possible steps to obtain a renewal of the licence, which the justices refused to renew at the next general annual licensing meeting, their ground for refusal being that Mrs. Evans had upon one occasion permitted drunkenness upon the premises upon the occasion above mentioned. It was thus that the licences of the Princess Royal Hotel were lost. In these circumstances the defendants are sued by the plaintiff as being assignees of Biggs for the residue of the term contained in the lease of October 16, 1874, and it is upon the true construction of the covenant therein contained that this case depends.

Whether the covenant sued on is one covenant or different covenants is not material, for it is clear that there are three separate and distinct parts of the covenant, under each of which a different obligation is undertaken by the covenantor. The first part commences, "And further that he the said John Biggs," and ends with the words, "for discontinuing the licences thereof." In our opinion this part of the covenant relates to the forfeiting of the licences when existing as distinguished from the renewal thereof, which is dealt with in the second part of the covenant. It would be wholly unreasonable to hold that both the first and second parts of the covenant referred to the same thing, so that both an absolute and qualified covenant existed as to the same thing. This first part in our judgment is an absolute covenant by the covenantor, his executors, administrators, and assigns, against the forfeiture of an existing licence of the Princess Royal Hotel, and does

not embrace the question of renewal of such licence. The second part of the covenant is a limited covenant, and is confined to the covenantor, his executors, administrators, or assigns wilfully doing or suffering anything which should be a reasonable ground for withdrawing or withholding the licences—i.e., which should afford a reasonable ground for the justices refusing to renew. This is clearly not an absolute covenant. And the third part of the covenant is a covenant by the covenantor, his executors, administrators, and assigns, to apply for and do all that shall be reasonably requisite for the renewal of the licences, and that when renewed he or they will deliver up the same at the determination of the term. This is not an absolute covenant. Now, as regards the first part of the covenant, no liability attaches to the defendants, for the simple reason that the then existing licences have not been forfeited. As regards the second part, the covenantor or his assigns have not wilfully done or suffered anything which should be a reasonable ground for the justices refusing to renew the licence. If the covenantor or his assigns are to be liable for a tenant of an assignee causing the licence not to be renewed, it seems to us there should either be a clear and absolute covenant that they would be so liable, or a covenant that such tenant would do nothing to jeopardize a renewal. We give no opinion upon whether Mrs. Evans's act was such as to afford reasonable ground for the justices refusing to renew. As regards the third part of the covenant, the facts shew that the defendants have done all in their power to obtain a renewal, but without avail. For these reasons we are of opinion that when the covenant sued on is correctly read no breach has been established against the defendants, and that this appeal therefore must be allowed, and judgment entered for the defendants, with costs here and below.

*Appeal allowed.*

Solicitors for plaintiff: *Bower, Cotton & Bower, for Stephens, David & Co., Cardiff.*

Solicitors for defendants: *Riddell, Vaizey & Smith, for Joseph Henry Jones, Cardiff.*

E. L.

C. A.

1898

*March* 2, 11, 13, 30.

[IN THE COURT OF APPEAL.]

## RUABON STEAMSHIP COMPANY, LIMITED *v.* LONDON ASSURANCE.

*Insurance, Marine—Ship docked for Repair of Sea Damage—Ship surveyed while in Dock for Lloyd's Classification—Apportionment of Dock Charges and Expenses.*

During a voyage covered by a policy of marine insurance a vessel sustained damage by a peril insured against, and was subsequently put into dry dock for the purpose of effecting repairs. The survey of the vessel for the purpose of renewing her classification in Lloyd's Register was not due for some months, but the owners took advantage of her being in dry dock to have the survey made, and her classification was renewed:—

*Held* (by Chitty L.J. and Collins L.J., affirming the judgment of Mathew J., A. L. Smith L.J. dissenting), that there must be an apportionment between the owners and underwriters of the expenses of getting the vessel into and out of the dock, as well as of dock dues incurred in respect of the common user of the dock for the repairs and the survey.

*Marine Insurance Co.* v. *China Transpacific Steamship Co.*, (1886) 11 App. Cas. 573, followed.

APPEAL from the judgment of Mathew J. at the trial before him without a jury. (1)

The plaintiffs' claim as indorsed upon the writ was for 2*l.* 5*s.*, being balance due in respect of a loss of 82*l.* 5*s.* under a marine policy of insurance dated November 16, 1895, for 2000*l.* on the steamship *Ruabon* subscribed by the defendants. Whilst so insured and upon a voyage from Kustendje to England the *Ruabon* ran aground and suffered considerable damage. She was taken to Cardiff and put into dry dock for the purpose of having average repairs effected in respect of which the underwriters were admittedly liable. In November, 1896, it would have been necessary for the *Ruabon* to be docked and surveyed in order to retain her No. 1 classification at Lloyd's, and the owners took advantage of the vessel being in dock for her repairs to have her surveyed by Lloyd's surveyor: she was

(1) Reported [1897] 2 Q. B. 456.

accordingly surveyed and retained her classification. An average statement was duly prepared, shewing the amount due from underwriters to be 822*l.* 14*s.* 10*d.*, of which the defendants' proportion was 82*l.* 5*s.* This included various sums for towage, pilotage, boatage, dock dues, and painting the ship's bottom. The defendants declined to pay the full amount of their proportion under the average statement on the ground that, as the vessel underwent her reclassification survey at the same time as the average repairs were effected, the cost of docking, &c., should be divided between owners and underwriters. The plaintiffs contended that the vessel went into dock solely for the purpose of effecting the average repairs, and that therefore the underwriters were liable for the whole of the above charges. Ultimately the defendants paid a sum of 80*l.*, and the plaintiffs brought this action to recover the balance. The following joint admissions were made for the purposes of the action. (1.) That the vessel in fact passed her No. 1 classification survey of Lloyd's Register of British and Foreign Shipping as required by the rules when she was in dock, the opportunity of her being in dock being taken to examine her bottom to see if reclassification repairs were necessary. This admission together with the remaining admissions was made subject to the following qualification: "but not that she went into dock for that purpose, nor that any such repairs were done, nor that the time had arrived at which it was necessary for her to pass such survey." (2.) That docking was necessary for the vessel to pass such survey. (3.) That the under-mentioned items were necessarily incurred in connection with the docking. J. Phillips: boat-hire and attendance from Roath Basin to pontoon, two boats, 1*l.* 10*s.*; boat from pontoon to Roath Basin, two boats, 1*l.* 10*s.* Cardiff Pilotage Board: piloting vessel on and off pontoon, 2*l.* 10*s.* E. Handcock, junr.: for service of steam-tug towing vessel on pontoon, 4*l.* 10*s.*; for service of steam-tug towing vessel off pontoon, 9*l.* F. Lovering: labour taking vessel from East Dock to pontoon, eight men at 12*s.* 6*d.*, 5*l.*; labour taking vessel from pontoon to Roath Basin, eight men at 15*s.*, 6*l.* Cardiff Channel Pontoon Company: docking and undocking, including tide on, tide off, and use of patent shoring,

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25*l*. Total, 55*l*. (4.) That such items were proper charges for the work done.

The learned judge held that the case was covered by the decision of the House of Lords in *Marine Insurance Co.* v. *China Transpacific Steamship Co.* (1), and gave judgment for the defendants.

*Cohen, Q.C.*, and *Montague Lush*, for the plaintiffs.

*Joseph Walton, Q.C.*, and *L. L. Batten*, for the defendants.

The arguments were substantially the same as in the Court below and may be gathered from the judgments.

*Cur. adv. vult.*

March 20. The following judgments were read:—

A. L. SMITH L.J. The real and important point which it is desired to have determined in this case is whether, when a ship puts into dry dock (in the present case into a wet dock with a pontoon therein) in order to repair damage occasioned by a sea peril for which underwriters alone are liable, the cost of piloting, towing, and other expenses necessary for getting the ship into dock for repair, and of getting her out again, when repaired, are to be borne by the underwriters, or whether these expenses are to be shared between the shipowner and the underwriters, if the shipowner, after the ship is in dock, takes advantage of her being there to get her surveyed so as to enable her to keep her class, or for any other purpose of his own.

It is said on behalf of the underwriters, who assert that these pilotage, towage, and other expenses are to be shared between the shipowners and themselves, that the principles laid down by this Court and affirmed in the House of Lords in what is called the *Vancouver* case (*Marine Insurance Co.* v. *China Transpacific Steamship Co.* (1)) shew that these expenses are to be shared. It becomes, therefore, necessary to ascertain what that case actually decided and what principles are therein laid down, for, unless these principles cover the present case, I have no doubt that these expenses fall wholly upon the underwriters.

(1) 11 App. Cas. 573.

From what is reported (1) in this case to have been the argument of counsel for the underwriters, I was at first under the impression that the question of sharing the pilotage, towage, and other expenses necessary to take the ship into and out of dock had been under consideration in this Court and in the House of Lords; but this is not so, and Mr. Joseph Walton, who appeared for the underwriters, says frankly that this is so, and he agrees with Mr. Cohen, who was for the plaintiffs (the shipowners) that the only question argued and determined in the *Vancouver Case* (2) was the sharing between the shipowners and the underwriters of the dock dues payable to the dock after the ship had arrived therein, which dues were incurred during that portion of time when the concurrent operations of the shipowners and underwriters upon the ship were going on. This question of pilotage, towage, and other expenses of getting the ship into dock, and which in the present case were not payable to the dock at all but to third parties, was clearly not decided by this Court or the House of Lords, and the *Vancouver Case* (2) is no actual authority thereon; but it is said that the principles underlying the decision are such that they cover the real point now raised in the present case. What the *Vancouver Case* (2) decided was that, where a ship is insured against perils of the sea, and the ship is placed in dry dock in order to carry out repairs which the shipowner for his own purposes desires to execute (i.e., scraping and painting the ship's bottom), which expenses the shipowner alone has to bear, nevertheless, if, when the ship gets into dry dock, it is discovered that by reason of a peril insured against damage has been occasioned to the ship which has to be repaired at the expense of the underwriters and of them alone, the dock dues incurred during these concurrent operations for the respective purposes of the shipowner and underwriters must be shared between them. That is the decision. The principle upon which this decision is founded I will state hereafter.

It is said by the plaintiffs (the shipowners) that their ship the *Ruabon* put into dock solely to repair damage for which the underwriters were alone liable, and not for any purpose of

(1) 11 App. Cas. at p. 584. (2) 11 App. Cas. 573.

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the shipowners, and that the pilotage, towage, and other expenses necessary for getting her into dock were incurred solely on underwriters' account, and this is true. It is said on behalf of the defendants, the underwriters, that, if these expenses had not been incurred, the ship would not have been in dock and the shipowners would not therefore have had the benefit of her being there to get her surveyed for her class, and this is also true; but the *Vancouver Case* (1) does not lay down that, whenever a person incidentally obtains a benefit, he must necessarily share expenses with another, which expenses had not been incurred on his account. If the pilotage, towage, and other expenses necessary for getting the ship into dock had been incurred in the present case for the purposes of both the shipowners and underwriters, for instance, to get the ship painted in dock, which is owner's repair, and also to get sea damage repaired, which is underwriters' repair, the case of the *Vancouver* (1) would have applied; but, as the expenses in question were not so incurred, it is here that I think the present case, as to the real point to be decided, parts company with the *Vancouver Case* (1) and any principle laid down therein. Take for instance the case of a ship damaged by perils insured against fifty, or twenty miles, or it may be a mile from a dock into which it is necessary to take her for repairs, for which underwriters alone are liable, being piloted and towed into dock for that purpose. Are underwriters on ship to escape the payment of these pilotage, towage, and other expenses, for which they are undoubtedly liable, because after the ship is placed in dock, when dock dues first begin to run, the shipowner utilises the occasion, and occupies a day in dock conjointly with the underwriters in getting her surveyed so as to retain her class, or as in the *Vancouver Case* (1) occupies three days conjointly with the underwriters to get her painted and scraped, whereby there has been a common user of the dock? It will be noticed that the expenses, when there was not this common user of the dock, I mean the remaining five days, were not shared in the *Vancouver Case.* (1)

As regards the dock dues, I agree that these must be shared,

(1) 11 App. Cas. 573.

for they have been incurred by reason of the common user of the dock for the purposes of the two. If the 25*l.* claimed in this case are for dock dues, then the *Vancouver Case* (1) covers them; but, as the pilotage, towage, and other expenses necessary for getting the ship into dock were not so incurred, but only for the purpose of the one, in my judgment they are altogether outside, not only the decision, but of any principle laid down in the *Vancouver Case*. (1)

I can find nothing in that case which lays down that the well-known rule in marine insurance law as to "on whose behalf are expenses incurred" is done away with. It is, too, worthy of remark that in the *Vancouver Case* (1) the plaintiffs and their eminent counsel, who were seeking to recover a particular average loss under a policy, and were trying, as best they could, to swell their claim against the underwriters, so as to escape a warranty therein "free from average under 3 per cent. unless general or the ship be stranded," never so much as suggested that the expenses of piloting, towage, and other expenses necessary for getting the ship into dock could be charged against the underwriters, for, it appears to me, the simple reason that these expenses had been incurred solely on behalf of the shipowners. They did claim the expenses in dock as having been incurred by reason of a common user of the dock for the purposes of both shipowners and underwriters, and they claimed the whole of the dock expenses, and, if they could not get the whole, then they claimed the half as being expenses incurred by reason of the common user for the purposes of the two; and in this last they succeeded as regards the three days during which the joint expenditure was going on. It is now left for underwriters on ship for the first time, so far as I know, to set up that the law is that, where there is an expenditure solely on their own behalf, this expenditure is nevertheless to be divided or otherwise shared between them and the shipowner. I do not agree with their contention. The Lord Chancellor, Lord Herschell, in the *Vancouver Case* (1), I think, pointedly lays down what is the principle upon which that case was decided. He says: "I have not lost sight of

(1) 11 App. Cas. 573.

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the fact that the vessel was put into dock only for the purpose of being scraped and painted, but I cannot think that this is material. The injury to the stern-post was immediately discovered, and she remained and was kept there, and the dock was employed for both purposes. Once this conclusion is arrived at, and also that the cost of repairing the damage caused by the perils insured against is the true test, all the rest, I think, follows." What does this passage mean? It means I think that, the expenses of putting into dock being only for the purpose of the shipowner, these expenses would fall upon him alone; but that was not material to the case then in hand, because the injury to the stern-post for which the underwriter had to pay was discovered immediately after the ship got into dock, and the dock was then employed for both purposes, that is for the purposes of shipowner and underwriter, and these costs must be therefore divided between the two. The Lord Chancellor says, "Once this conclusion is arrived at"—What conclusion? Why, that the dock was employed for both purposes—"then all the rest follows." The principle upon which this case was decided was that, if there be an employment for two purposes and expenses for these two purposes are incurred in common, then each person who utilised the occasion must bear his share of the expenses incurred; but, if the employment is only for one purpose, then the old principle that he for whom the employment takes place must pay the cost is left untouched. What I have said as to taking the ship into dock applies to taking her out. If all or any part of the 25*l.* mentioned in the admissions is for dock dues whilst the common user was going on, these, as before stated, will come within the decision in the *Vancouver Case* (1); but this is not the real point the parties wish decided.

I need not say that it is with regret that I find myself disagreeing with my brother Mathew and my brethren in this Court, but as I have an opinion upon the matter I am bound to express it, and I do. For the reasons above I think that this appeal should be allowed.

(1) 11 App. Cas. 573.

CHITTY L.J. The amount in controversy is small, but the question is one of importance to shipowners and underwriters. It is whether the expenses of taking the steamship *Ruabon* into and out of the pontoon dock, and placing her there, and the dock dues whilst she was there, ought to be apportioned between the owners and the underwriters in the circumstances of the case. The particulars of the expenses in controversy are set forth in the admissions. They amount to 55*l.*, and consist of boat-hire to and from the pontoon and Roath Basin, piloting the vessel on and off the pontoon, towing the vessel on and off the pontoon, labour taking the vessel from East Dock to the pontoon and taking her from the pontoon to the Roath Basin, and docking and undocking, including tide on, tide off, and use of patent shoring. This last item (25*l.*) was paid to the Cardiff Pontoon Company, and appears to be for dock dues. The other items were paid to other persons. It is admitted that the charges are proper, and that all the items were necessarily incurred in connection with the docking. My reason for mentioning the items with some particularity will presently appear. For the shipowners it is contended that the whole of these expenses fall on the underwriters. If they ought to be apportioned, it is conceded that the apportionment should be in equal shares.

The ship was taken to and placed on the pontoon for the purpose of repairs, the burden of which fell on the underwriters. While the ship was on the pontoon, and after she had been opened out, the owners availed themselves of the opportunity of having her surveyed for the purpose of maintaining her classification, and they obtained the required certificate. The time had arrived when they were entitled according to Lloyd's rules to have her examined for classification, though there still remained some months to run before she would have lost her classification, if not re-surveyed. It is admitted that docking was necessary for the vessel to pass her survey. In the *Vancouver* case (*Marine Insurance Co.* v. *China Transpacific Steamship Co.* (1)), the ship was taken into dock by the owners for the purpose of repairs, the expense of which fell on the owners alone. While there, it was discovered that she had

(1) 11 App. Cas. 573.

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sustained injury while at sea to her stern-post; the burden of these repairs fell on the underwriters exclusively. There were three common days while the ship was in dock, during which both sets of repairs were being done simultaneously. Neither set of repairs interfered with or delayed the execution of the other. Each set required the whole of the three days. The Court of Appeal and the House of Lords held that, inasmuch as the dock was in fact being used for both purposes during the three days, the dock dues for those three days had to be borne by the owners and underwriters in equal shares. The question, then, on this appeal is whether this case is governed by the *Vancouver Case*. (1) Mathew J. has held that it is.

On the argument for the appellants before us a distinction, which does not appear to have been taken before Mathew J., was drawn between the expenses of taking the ship to and from the pontoon on the one hand, and the pontoon dues (the 25*l*.), while the ship was actually on the pontoon, on the other hand. It was urged for the appellants that, whatever the decision might be as to the latter, no part of the former ought in any event to be thrown on the shipowners. The report of the *Vancouver Case* (1) seemed to leave it in doubt whether the expenses of taking the ship into and out of the dock were there in question. But Mr. Joseph Walton, who had obtained the papers, was in a position to inform us, first, that these expenses were not in controversy in the action, and, secondly, that the cost of docking and undocking had before the action been apportioned in the average statement.

It appears to me that this case is undistinguishable from the *Vancouver Case*. (1) First, as to the pontoon dues. I think these dues fall within the actual decision. I understand the decision of the House of Lords to be that on the question of the actual user of the dock, while the ship is in dock, and the dock is being in fact used simultaneously for shipowners' purposes and underwriters' purposes, it is immaterial for whose purposes she was first brought into dock. This does not touch the question as to the expenses of taking her in and out. In the case before us the pontoon was utilised for the classification,

(1) 11 App. Cas. 573.

which is the owners' purpose, and for repairs for sea damage, which are underwriters' purpose. Both the owners and the underwriters gained an advantage and received a benefit from the common user. Had the owners postponed the classification survey, they would have had to bear the whole of the expense of docking necessarily within a short period of time. This time they anticipated. It was said by Mr. Cohen that during this period of time the ship might have been lost at sea. Granted; but the owners did in fact use the pontoon for their own purpose, acting in this respect as a prudent owner would do.

Secondly, I think that the principle of the decision in the *Vancouver Case* (1) covers the expenses of taking the ship into and out of the dock. These expenses, as is admitted, were necessarily incurred in connection with the docking. I understand them to be strictly incidental to the operation of docking. I draw the line definitely at this point. They seem to me to be mere accessories which ought to follow the principal. As I understand the facts, they were not in any way occasioned by the condition of the vessel or by reason of her having been disabled by sea damage for which the underwriters were liable. Had they been made more onerous in the whole or in part by reason of the ship's disability arising from the sea damage within the policy for which the underwriters alone were responsible, the case would have stood differently, and they would have fallen in the whole or in part, as the case might be, on the underwriters exclusively. I entirely agree with what the Lord Justice has said with reference to a ship being disabled at sea at a distance from a port and requiring the assistance of a tug to tow her in. The expense of any such towage would undoubtedly fall upon the underwriter. I absolutely exclude anything in the nature of a voyage, and any expense arising from the disability of the ship within the policy. If there should be any such expense included within any of the admitted items, the parties whose object it is to obtain a decision on the main points will, no doubt, readily adjust it. I add that in my opinion it makes no difference whether the necessary expenses

(1) 11 App. Cas. 573.

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of getting the ship in and out are paid to the dock company or to some other person.

It will be seen that I differ in some respects from the judgment of the Lord Justice. So far as I differ, I differ with reluctance. For these reasons I think that the appeal ought to be dismissed.

COLLINS L.J. I think this case is concluded by the *Vancouver Case*. (1) I think the principle of that case is that, where repairs in respect of damage for which underwriters are liable have been executed simultaneously with repairs as to which the owner is uninsured, and an expense has been incurred which would have been necessary for either purpose alone, such expense is not to be wholly attributed to one set of repairs alone, but forms a factor in the cost of each, and must therefore be divided between them in some proportion, which primâ facie would be equally. The problem really is to find the cost at which each set of repairs has been executed. Each has been executed at a less cost, because there is a common factor in the expenses which has inured to the benefit of both, and, in stating an account of the cost of each, the person carrying out the repairs would be bound to debit each set with a proportion of the common items. This is a perfectly simple and intelligible principle and applies to this case. It gets rid of all questions as to what was the sole or primary motive of incurring the common expenditure, or whether it was necessary at that time, and substitutes the simple test, "What was the cost of the work in fact done?" for nice questions as to whether the doctrines of subrogation, salvage, implied request arising from compulsion, can be made to apply. This test, namely, what did the work cost, seems to me to cover the expense of taking the ship into and out of dock just as much as the expense of using the dock. It would have been necessary to get the ship into dock for the purpose of making the survey, and putting her in involved taking her out; so likewise as to the repairs of sea damage; and no fair statement of the cost of either operation could have omitted this element of expendi-

(1) 11 App. Cas. 573.

ture. Therefore it has to be apportioned. The passage cited from the speech of Lord Herschell, so far from being inconsistent with this view, I venture to think establishes it. It eliminates the intention with which the operation of docking was undertaken as a factor in the discussion, and makes the fact that the opportunity was utilised the governing consideration. The benefit of antecedent expenditure by which the opportunity was created is just as much enjoyed by the person who elects to avail himself of the opportunity as is the expense by which the opportunity is prolonged during such time as he requires it. Lord Herschell's very words seem to cover it. He says (1): "Once this conclusion is arrived at"—i.e., that the dock was employed for both purposes—"and also that the cost of repairing the damage caused by the perils insured against is the true test, all the rest, I think, follows." It has been suggested that this principle would cover the whole cost of towing a disabled ship from mid-ocean to port and thence to dock, but I think that as a practical question there would be no difficulty in drawing the dividing line at the point where the expenses properly applicable to the operation of putting the ship into dock began, and a share of such expenses only would enter into the cost of a survey made as here because the ship was in the most convenient position for making it. The cost of towing the ship to port would be no more part of the cost of the survey than would the cost of navigating the ship to the same port, had she met with no accident. The expenses in this case embrace nothing not incidental to the operation of docking. I think the judgment of Mathew J. was right and ought to be affirmed.

*Appeal dismissed.*

Solicitors for plaintiffs: *Botterell & Roche, for Vaughan & Hornby, Cardiff.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

(1) 11 App. Cas. at p. 590.

E. L.

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*March* 28.

## THE QUEEN *v.* ROBINSON AND ANOTHER, JUSTICES.

*Bastardy—Simultaneous Applications to several Justices—Summons heard on one Application—Dismissal on Merits—Summons issued on another of the Applications — Jurisdiction — Bastardy Laws Amendment Act*, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 3.

A bastard child having been born in September, 1896, the mother on October 21, 1896, made three separate applications to three different justices for a bastardy summons against the defendant, but as she was at that time unable to find him the issue of the summons was suspended. In July, 1897, the mother, having found the defendant, procured one of the three justices to issue his summons upon the application so made to him on October 21, 1896. On November 3, 1897, that summons was heard, and dismissed on the ground that the evidence was insufficient. On November 17, 1897, she procured another of the three justices to issue a further summons against the defendant, which summons purported to be founded on the application to the said justice of October 21, 1896. The summons was heard and a bastardy order made :—

*Held*, that the three applications made on October 21, 1896, were in substance but one application, and were exhausted by the hearing and dismissal of the summons on November 3, 1897, and that the order was consequently made without jurisdiction.

RULE for a certiorari to bring up a bastardy order to be quashed.

On September 9, 1896, the complainant, Annie Kirkham, was delivered of a bastard child, and on October 10, 1896, she applied for and obtained an affiliation summons against the defendant, Henry Corbishley, but was unable to serve it on him owing to her being unable to find him. On October 21, 1896, she made three separate applications in writing to three different justices, John Brealey, John Robinson, and Thomas Phillips, for a similar summons against the defendant in respect of the said child, but no summons was then issued by any of the said three justices, as it appeared that service could not then be effected. The object of making three applications was that whenever the defendant could be found or his place of abode ascertained a summons might be issued by any one of the said three justices, and that the complainant might guard against the possibility of being left without a remedy, which would have

been the case if application had been made to one justice only and he had died before a summons could be issued. On July 28, 1897, the said John Brealey issued a summons against the defendant based on the application of October 21, 1896, which summons was duly served upon him. On November 3, 1897, the defendant appeared and the case was heard. The justices after hearing the evidence were not satisfied that the defendant was the father of the child and refused to make an order, but stated that the case was not dismissed on the merits, and that if the complainant could bring further evidence she might apply again. On November 17, 1897, the said John Robinson issued another summons, based on the application to him of October 21, 1896, which summons was duly served on the defendant. On December 29, 1897, it came on for hearing, when objection was taken on behalf of the defendant that the justices had no jurisdiction, on the ground that the summons was not issued on an application made within twelve months from September 9, 1896, the date of the birth of the child, the three applications made on October 21, 1896, having been exhausted by the hearing on November 3, 1897. The justices overruled the objection, and, having heard the case on the merits, made an order against the defendant. A rule for a certiorari was then obtained on behalf of the defendant to bring up the order to be quashed.

*Hume Williams*, for the complainant, shewed cause. The question is whether the complainant satisfied the provisions of s. 3 of 35 & 36 Vict. c. 65 (1), which require that the application for a summons shall be made within twelve months after the birth of the child. It is settled that the summons may be issued after the expiry of the twelve months if it be founded upon an application made within that period. It need not be issued immediately upon the making of the application,

(1) By s. 3 of 35 & 36 Vict. c. 65, "Any single woman . . . . who may be delivered of a bastard child after the passing of this Act may . . . . at any time within twelve months from the birth of such child . . . . make application to any one justice of the peace . . . . for a summons to be served on the man alleged by her to be the father of the child . . . . and such justice of the peace shall thereupon issue his summons."

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notwithstanding the use of the word "thereupon" in the section, if for any reason it is impossible to serve it at once: *Potts* v. *Cumbridge*. (1) Nor is the complainant confined to one application. She may make any number of applications she pleases, and the hearing and dismissal of one summons, even on the merits, is no bar to an application for a further summons, provided the application be made within the year: *Reg.* v. *Gaunt*. (2) Here the application on which the summons was founded was made within the year. The other side will rely on *Reg.* v. *Thomas*. (3) There, the child having been born in November, 1859, the application for a summons was made in March, 1860. The summons was heard and dismissed. In December, 1862, a fresh summons was issued based on the same application and an order made. It was held that by the dismissal of the first summons the application was spent, and that the order made on the second summons was consequently bad. And the case of *Staples* v. *Staples* (4) is to precisely the same effect. Those cases, however, are distinguishable, for in both of them there was only one application to one justice, whereas here there were independent applications to different justices, and the exhaustion of one of those applications does not exhaust the others. But, even if the three applications are to be regarded as one, the dismissal of the summons on November 3, 1897, did not exhaust the application, for the justices expressly stated that they did not dismiss the case on the merits. In *Reg.* v. *Justices of Lancashire* (5), where the birth of the child had taken place before the passing of the Bastardy Laws Amendment Act, 1872, an application for a summons was made on October 17, 1873, within six months after the passing of the Bastardy Laws Amendment Act, 1873, as required by that latter statute. The summons, which stated the correct date of the birth of the child, but by mistake alleged that date to be after the passing of the Act of 1872, was heard on November 7, 1873, and dismissed on the ground of that mistake. It being then

(1) (1858) 8 E. & B. 847. Decided on s. 2 of 7 & 8 Vict. c. 101, in which the language is identical.

(2) (1867) L. R. 2 Q. B. 466.

(3) (1863) 8 L. T. (N.S.) 460.

(4) (1879) 41 L. T. (N.S.) 347.

(5) (1874) 29 L. T. (N.S.) 886.

too late to make a fresh application, the justice issued a fresh summons purporting to be based on the application of October 17, and an affiliation order was made. On a rule for a certiorari it was held that the justices had jurisdiction to make the order. The facts of the present case fall within the principle of that case.

*Montague Lush*, for the defendant, in support of the rule. The case is covered by the authority of *Reg.* v. *Thomas* (1) and *Staples* v. *Staples*. (2) It makes no difference that in the present case there were in form three applications on October 21; there was in reality but one application in triplicate. They were all equally exhausted by the hearing and dismissal on November 3. One of them being adjudicated upon, the others stood void. The hearing of November 3 was, notwithstanding the statement of the justices to the contrary, a hearing on the merits. What the justices probably meant was that the complainant might apply again if she was not too late: a permission which was superfluous, for she had a right to do so without any permission, and notwithstanding a hearing and dismissal on the merits, on the authority of *Reg.* v. *Gaunt*. (3) The case of *Reg.* v. *Justices of Lancashire* (4) is distinguishable, for there there was no hearing of the first summons on the merits. The summons was dismissed on the ground that it was defective in form; it might have been amended. The dismissal did not amount to a hearing and determination; and for that reason alone the Court held the application to be not exhausted.

LORD RUSSELL of KILLOWEN C.J. I should have been very glad if we could have seen our way to support the order of the magistrates in this case, because we cannot help seeing that it was the conduct of the defendant in keeping out of the way which prevented the complainant from making a fresh application within the time limited by the statute. The case for the complainant was put in two ways. First, it was said that, even if the three applications of October 21, 1896, were to be treated as one, still that application was not exhausted by what took

(1) 8 L. T. (N.S.) 460.
(2) 41 L. T. (N.S.) 347.
(3) L. R. 2 Q. B. 466.
(4) 29 L. T. (N.S.) 886.

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place before the justices on November 3, 1897, for that there was no determination of the complaint, and the case consequently fell within the principle of *Reg.* v. *Justices of Lancashire*. (1) With that I cannot agree. It seems to me that the present case is, so far as this point is concerned, on all fours with the cases of *Reg.* v. *Thomas* (2) and *Staples* v. *Staples* (3), in each of which cases, as in the present, the summons was dismissed, not for any defect in form, but for insufficiency of evidence. And, on the authority of those cases, I think we must hold that the applications of October 21, 1896, were exhausted by the dismissal of November 3, 1897. It is true that the justices said that the complainant might come before them again, but I do not think that that is sufficient to justify us in treating the summons of November 17, 1897, as a continuance of the summons of July 28, 1897. It must be regarded as a fresh summons, which, to be effective, ought to have been founded on a new and distinct application made within the twelve months. With regard to the right of the complainant to come again, that was a matter which did not depend on the will of the justices. She had an absolute right to come again, if the time within which a fresh application could be made had not expired. In *Reg.* v. *Justices of Lancashire* (1) the summons was wrong in point of form, and the justices, instead of amending it as they might have done, dismissed the complaint. It was held that the dismissal under those circumstances did not amount to a determination, and that a second summons might be issued on the original application. The present case is very different. Then, secondly, it was said that, even if the dismissal of Brealey's summons exhausted the application to Brealey, it did not exhaust the applications to the other justices. That depends on whether they are to be treated as three applications or as one. I think they must be treated as one. They are in substance duplicates of the same application, and if one of them is exercised the whole are exhausted. I regret to have to come to this conclusion, but I think it would be a straining of the law to hold otherwise.

(1) 29 L. T. (N.S.) 886. (2) 8 L. T. (N.S.) 460.
(3) 41 L. T. (N.S.) 347.

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MATHEW J. I am of the same opinion. I had hoped that from the terms in which the justices dismissed the summons on November 3 we might be justified in holding that that dismissal did not amount to such a determination as would exhaust the application on which the summons was based. But on examining the language of the justices critically I come to the conclusion that they intended, not to adjourn the hearing, but to dismiss the summons, being under the impression that the complainant would have an opportunity of coming before them on a fresh summons.

*Rule absolute.*

Solicitors for complainant: *Everett & Hodgkinson.*
Solicitors for defendant: *Chester & Co.*

J. F. C.

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## THE LOWER RHINE AND WÜRTEMBERG INSURANCE ASSOCIATION *v.* SEDGWICK.

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*Feb.* 8, 10, 11.

*Insurance, Marine—Re-insurance—Construction of Policy—Re-insurer's Liability on Subsequent Policies.*

A time policy of insurance on a ship was expressed to be "a re-insurance of policy or policies and subject to the same terms, conditions, and clauses as original policy or policies and to pay as may be paid thereon." The assured had underwritten two time policies on the ship, and these were in force when the re-insurance was effected. Subsequently, during the currency of the re-insurance policy, the two original policies came to an end, and he underwrote a fresh time policy of insurance of the same subject-matter differing in certain respects from the two earlier original policies:—

*Held*, that the re-insurers' liability was not limited to losses covered by the policies existing when the re-insurance was effected, but that the policy of re-insurance covered a loss, occurring during its currency, which the assured paid under the policy underwritten by him after he effected the re-insurance.

COMMERCIAL CAUSE, tried before Kennedy J.

The action was brought to recover money paid by the plaintiffs to the defendant under a policy of re-insurance on the steamship *Collynie*.

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The material facts proved or admitted at the trial were as follows:—

On February 20, 1896, the defendant with six others subscribed, for 50*l.* each, a policy of insurance of that date, "upon any kind of goods and merchandises, and also upon the body, tackle, apparel, &c., of and in" the steamship *Collynie*, lost or not lost, for and during the space of twelve calendar months from the same date. The amount insured was 350*l.* A clause of the policy provided that "the said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at—on hull valued at 3600*l.*—machinery valued at 2000*l.*" The premium was at the rate of nine guineas per cent. The "time clauses" attached to the policy provided for returns of premium thus: "15/ per cent. for each uncommenced month if this policy be cancelled. As follows for each consecutive 30 days the vessel may be laid up in port, viz., 14/ per cent. if in the United Kingdom not under average, 12/6 per cent. under average, or if abroad."

On June 20, 1896, the defendant, with six others, subscribed, for 25*l.* each, a further policy of insurance of that date on the *Collynie* for twelve calendar months from the same date. This policy was identical in terms with the policy of February 20, except that the amount insured was 850*l.*

By a policy of re-insurance, dated November 27, 1896, the defendant, with six others, effected an insurance for 250*l.*, lost or not lost, with the plaintiffs "for and during the space of time commencing November 4, 1896, and ending June 20, 1897, both days inclusive, as employment may offer . . . . upon any kinds of goods and merchandises, and also upon the body, tackle, apparel, &c., and other furniture of and in the ship *Collynie*, being a re-insurance of policy or policies, and subject to the same terms, conditions, and clauses as original policy or policies whether re-insurance or otherwise, and to pay as may be paid thereon. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and the association in this policy, are and shall be on hull and machinery valued at 5600*l.*" The premium was at

the rate of ten guineas per cent. In the slip the insurance was stated to be on the hull, &c., of the *Collynie* valued at 5600*l.*; the words "time clauses as original" followed, and there was a printed clause at the foot: "In the event of any inaccuracy in description of voyage, interest, name of vessel, clauses or conditions, it is agreed to hold the assured covered at a premium to be arranged."

On February 20, 1897, the policy of February 20, 1896, expired by effluxion of time, and the policy of June 20, 1896, was cancelled, and the proportionate amount of premium therefor was returned to the assured thereunder. Such cancellation was unknown to the plaintiffs, and without any notice to them. Those policies had never been seen by the plaintiffs, nor had they asked to see them.

On the same February 20, 1897, the defendant, with eight others, subscribed, for 50*l.* each, a policy of insurance for 1040*l.* on the *Collynie*, lost or not lost, for twelve calendar months from that date. The valuation clause was: "The said ship, &c., goods and merchandises, &c., for so much as concerns the assured, by agreement between the assured and assurers in this policy, are and shall be valued at—on hull and machinery—5000*l.*" The premium was at the rate of ten guineas per cent. The time clauses provided for the following returns of premium: "16/8 net per cent. for each uncommenced month if this policy be cancelled. As follows, for each consecutive 30 days the vessel may be laid up in port, viz., 15/8 net per cent. if in the United Kingdom not under average, 14/2 net per cent. under average, or if abroad." In all other respects this policy was in the same terms as the policies of February 20 and June 20, 1896.

On May 3, 1897, the *Collynie* was totally lost. Defendant and his co-subscribers of the policy of February 20, 1897, paid for a total loss under that policy. The plaintiffs paid the defendant for a total loss under the re-insurance policy of November 27, 1896, without asking for production of original policies.

The plaintiffs on November 30, 1896, had re-insured their liabilities under the re-insurance policy of November 27. When

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they sought to recover from their re-insurers, the latter required to be shewn the original policies, and the plaintiffs then ascertained the facts with respect to the cancellation and expiration of the two original policies of 1896, and the substitution of the policy of February 20, 1897. This action was brought to recover the moneys paid by the plaintiffs to the defendant, as being paid without consideration and in the mistaken belief that they were due.

*English Harrison, Q.C.* (*Joseph Hurst* with him), for the plaintiffs. The terms of the re-insurance policy of November, 27, 1896, limit the plaintiffs' liability as insurers to losses which the defendant may have to pay as underwriter of policies already in existence. The words in the slip, "Time clauses as original," and the printed clause at the foot, also make it clear that the re-insurance is to be in respect of existing policies only. The plaintiffs take the same liability as the defendant had at the date of the re-insurance. Even if they were liable in respect of a policy or policies underwritten by the defendant after the re-insurance, their liability must not be altered by the subsequent policy or policies. Here the policy of February 20, 1897, imposes new liability upon them. The valuation of the hull and machinery of the vessel differs in amount from the valuation in the earlier policies of February 20 and June 20, 1896, and the hull and machinery are valued together at one sum instead of separately as in the earlier policies. A higher premium is charged, and in the time clauses the amounts of premium to be returned are larger. Further, the time clauses provide the insured value is to be taken as the repaired value in estimating a constructive total loss. The reduction of the valuation in the policy of February 20, 1897, alters the plaintiffs' liability in that respect, and would give rise to the question, what would be their liability if there was a constructive total loss and the repairs came to 5000*l.* but not to 5600*l.*

*Joseph Walton, Q.C.*, and *Scrutton*, for the defendant. No fraud or misrepresentation of any kind is alleged against the defendant; the only question is, could he have recovered

against the plaintiffs what he paid under the policy of February 20, 1897? It is submitted that he could. All he need shew was that when the loss occurred he was interested as an insurer to the amount covered by the re-insurance policy in the same subject-matter, and that the loss occurred during the currency of the re-insurance policy, and came within the terms of it. It is immaterial whether his interest at the time of the loss was, or was not, under a policy or policies existing at the date of the re-insurance. It is not necessary that an assured should have any interest at the date of his policy; it is sufficient if he has it at the time of the loss: *Rhind* v. *Wilkinson* (1); Arnould on Marine Insurance, 6th ed. pp. 58, 59. More interests than one in the subject-matter may be protected by one policy with one description: *Carruthers* v. *Sheddon*. (2) If the assured's interest in the subject-matter becomes changed during the currency of the policy, he may recover on the interest existing at the time of the loss: Phillips on Insurance, 3rd ed. s. 394; Parsons on Marine Insurance, vol. i. pp. 243, 244. The same principles apply to a re-insurance, which is essentially the same as an original insurance. The policy need not be expressed to be a re-insurance; it is enough if the description of the subject-matter is the same as in the original policy: *Mackenzie* v. *Whitworth*. (3) There is nothing in this policy to prevent the ordinary principles of law from applying. The words "subject to the same terms, conditions, &c., as original policy or policies, and to pay as may be paid thereon" refer to the terms, &c., of any policy or policies upon which the defendant may have to pay whether they came into existence before or after the date of the re-insurance policy. So, if the slip may be looked at, do the words "time clauses as original." The meaning is that the terms and conditions of any original policy are to apply so far as they do not vary the terms of the re-insurance policy. The clause at the foot of the slip, which appears to apply rather to a voyage than to a time policy, does not alter the construction contended for. The differences between the earlier policies and that of February 20,

(1) (1810) 2 Taunt. 237. (2) (1815) 6 Taunt. 14.
(3) (1875) 1 Ex. D. 36.

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1897, are immaterial. The plaintiffs' liability is limited by the valuation of hull and machinery in the re-insurance policy, and they have no concern with the other differences suggested.

*English Harrison, Q.C.*, replied.

*Cur. adv. vult.*

Feb. 11. KENNEDY J. In this case the plaintiffs bring their action, in substance, to recover moneys alleged to have been received by the defendant for the use of the plaintiffs. The action is really to recover moneys paid by re-insurers of a ship lost in May last on the ground that the payment was made under a mistake of fact. [The learned judge here stated the facts.

Substantially, the plaintiffs base their case upon two grounds. First, they say that the policy of re-insurance must be treated as being effectual only in respect of a payment made by the defendant upon policies existing at the time it was effected.

The second point is that, even if that were not so, the policy which existed at the time of the loss—namely, the policy of February 20, 1897—contained provisions differing in several respects from the provisions in the two earlier policies of February 20 and June 20, 1896, and from those which appear to be embodied in and to form part of the re-insurance policy of November 27, 1896. The main difference is that in the two earlier policies of February 20 and June 20, 1896, the hull and machinery of the *Collynie* were valued at 5600*l.*, whereas in the policy of February 20, 1897, they are valued at 5000*l.* only. There are also separate valuations of hull and machinery in the two earlier policies, whereas in the policy of February 20, 1896, the hull and machinery are valued at one lump sum of 5000*l.*, and there are differences in the amount of the premiums, and in the time clauses with respect to returns for uncommenced months. It is said that these are differences which render the plaintiffs not liable to be called upon to pay under the policy of re-insurance, even if the defendant could call upon them to pay, under that policy, in respect of his having paid under a policy underwritten by him after the date of the policy of re-insurance. I am of opinion that the con-

tentions made on behalf of the plaintiffs are not well founded. The question may be conveniently treated as if the defendant were plaintiff and the plaintiffs defendants, and he was seeking to recover from them what he had paid under the policy of February 20, 1897. In order to form an accurate judgment on the case, it is well to see how, in accordance with insurance law, a plea could be framed to answer his claim. It is clear that he had, as insurer, an insurable interest in the hull and machinery of the *Collynie* at the time of the loss. It is immaterial, generally speaking, for the purposes of marine insurance that there should be any averment or proof of an interest at the date of the policy effected; it is sufficient that there is an interest at the time of the loss, and it appears to me that, unless there is something special in the terms of the policy, an insurable interest existing at the time of the loss would be sufficient. So, I think, in regard to re-insurance, if at the time of the loss a policy exists upon which the insurer pays, then he is entitled to recover from his re-insurer, whether the original policy was effected before or after the re-insurance, unless there is something special. Further, assuming that not to be so, and assuming he must shew that he had an existing interest, at the time of the re-insurance, in the subject-matter referred to in both policies, the defendant here had in fact an interest as insurer under the two earlier policies in the subject-matter, and it is, to my mind, immaterial that his interest had in point of amount or in point of it being under new policies diminished or increased at the time of the loss. The character of his interest remained the same. He was at the date of the policy of re-insurance interested as an insurer; his interest was of the same nature at the time of the loss. If there has been a change, it is merely in his relations with the person with whom he originally insured the ship—a change in respect of amount possibly, or of terms, but that would not affect his insurable interest, or the character of it, as appearing in the re-insurance policy.

Now, the policy upon which the plaintiffs have paid the defendant undoubtedly shews on the face of it that it is a re-insurance policy. It is stated to be so in terms. It does not

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state whether the re-insurance is in respect of one policy or more; it says in effect, "I insure upon the hull and machinery of the *Collynie*, and my interest in making that insurance is a re-insurance of policy or policies." As I have said, a policy or policies did exist at that time as well as at the time of the loss. It goes on to say, "Subject to the same terms, conditions, and clauses as the original policy or policies, whether re-insurance or otherwise, and to pay as may be paid thereon." I think, in accordance with the argument of counsel for the defendant, that the meaning in substance of the words "original policy or policies" is "the policy or policies in respect of which, when the loss takes place, I can prove that I have paid on the ship." It means "original" in the sense only that they are to be policies on which the defendant is an insurer, and in respect of his interest in which he may make a claim under the re-insurance policy. Then his claim is subject to the same terms, conditions, and clauses as the policy upon which he may have had to pay. In other words, the re-insurer contracts thus: "Whatever policy you pay upon as the original policy, so far as regards its terms, conditions, and clauses, I will pay upon as a re-insurer, except, of course, so far as there may be in the terms of the re-insurance something which qualifies or cuts down those terms, conditions, and clauses." It is common enough, I believe, where re-insurers have themselves again re-insured, to cut down some of the terms of an original insurance. The re-insurance may be effected only for certain purposes, as on a total loss only, in which case, although the original insurer may have paid on a partial loss, he cannot come upon his re-insurer, because the limits of the liability of the re-insurer are narrower than the limits contained in the original policy.

Stress was laid upon the fact of the increase of the valuation in the re-insurance, because it was pointed out, and truly, that the difference of valuation may have an effect upon one of the time clauses, which provides that the insured value is to be taken as the repaired value in ascertaining whether the vessel is a constructive total loss, and I agree that a question might arise, assuming there was a constructive total loss, and the repairs were found to have reached the 5000*l.*, but not to reach

the 5600*l.*, what would be, if any, the liability on the re-insurers. I am not called upon to decide that question here. There was an actual total loss which is not affected by the difference existing in the amount of the valuation, though that difference may affect, no doubt, the liabilities of the parties in the case of a constructive total loss. The description of the subject-matter—hull and machinery—is the same, and I think the effect of valuing it in the one policy at 5000*l.* and in the other at 5600*l.* cannot be to destroy the effect of the policy of re-insurance. Reference was also made to the fact of the form of the slip. I do not think myself, in the absence of any claim based upon misrepresentation, that I have any business to look at the slip; but, if I may look at it, I cannot see that there is anything in it to vary the true legal effect of the re-insurance policy taken by itself. "Time clauses as original" means "time clause as in the policy, whatever it is, upon which I, the assured, when I come to ask you, the re-insurer, to pay me, assert and can prove that I have paid." I was referred to a printed clause at the bottom of the slip. Now, this particular slip does not appear to me to be a slip specially appropriate to re-insurance policies. I doubt greatly whether the printed matter at the bottom ought to be treated in a business point of view as specially affecting, or being specially intended to refer to, the fact of re-insurance. It is obviously a form—commonly used, it may be, in an insurance office—primarily referable not to a time policy at all, because it is a clause which provides for the event of any inaccuracy "in description of the voyage." This is a time policy, and from the use of this slip or insurance form no inference, in my opinion, ought to be drawn that the assured meant to contract that he would only claim on this re-insurance if he shewed that he was paying on some policy or policies already in existence.

As to the difference in the amount of premium, I do not think that the re-insurer has anything to do with that in this matter. Nor do I think that the difference in the time clauses with respect to returns for uncommenced months is material. A good defence could not, it seems to me, have been framed to an action on the re-insurance policy in which the plaintiff alleged

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that at the time of the loss he had an interest as an insurer in the subject-matter of the re-insurance, namely, the hull and machinery of the *Collynie*, and that he had in fact paid for a total loss upon that subject-matter during the currency of the re-insurance policy, and could produce a policy upon which he had so paid for a total loss. I think that the total loss in this case is a loss intended to be covered by the re-insurance policy. I am of opinion that on every ground of claim this action fails.

*Judgment for the defendant.*

Solicitors for plaintiffs: *Pritchard & Sons.*

Solicitors for defendant: *Waltons, Johnson, Bubb, & Whatton.*

W. A.

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*March* 15.

## THE LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* DONELLAN.

*Railway—Regulation—Charge for Use of Sidings—Right of Action—Arbitration—Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25)—*Provisional Order.*

By a Provisional Order, made by the Board of Trade under the Railway and Canal Traffic Act, 1888, a railway company were empowered to charge, in addition to the tonnage rate, a reasonable sum for the service, if rendered to a trader at his request or for his convenience, of allowing him "the use or occupation of any accommodation, before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof," and "any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." The company gave notice to the defendant, a trader, that they would allow him four days, free of charge, within which to unload goods consigned to him arriving at their station, and that after the expiration of the four days they would charge him 6*d.* per day siding rent for each wagon allowed to remain unloaded. In an action by the company to recover from the defendant siding rent at the rate of 6*d.* per day in respect of wagons which, after receiving that notice, he had allowed to remain unloaded after the four days, the defendant disputed the reasonableness of the amount charged:—

*Held*, that the Provisional Order did not apply to oust the jurisdiction of the Court to try the action.

APPEAL from a decision of the deputy judge of the Crewe County Court.

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The action was brought to recover 27*l.* alleged to be due from the defendant, a coal merchant at Crewe, to the plaintiffs, a railway company, for rent of sidings.

The defence was specially pleaded that the Court had no jurisdiction to try the case, because by a Provisional Order made by the Board of Trade under the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), and confirmed by the Railway Rates and Charges, No. 10 (Lancashire and Yorkshire Railway, &c.) Order Confirmation Act, 1892 (55 & 56 Vict. c. xlviii.), jurisdiction was given to an arbitrator appointed by the Board of Trade. (1)

In January, 1895, the general manager of the plaintiff company gave notice to traders (including the defendant) receiving coal and coke sent by the London and North Western Railway as follows :—

"I have to inform you that as great and continued delays take place in discharging loaded coal and coke wagons, involving the company in serious additional expense and impeding the working of their sidings, yards, and stations, it has been determined to require payment for such undue and unreasonable occupation of their premises, and the following conditions will come into operation at stations outside the London area, i.e., north of Willesden, on and from the first of March next. Advice

(1) The Provisional Order, cited as "The Railway Rates and Charges, No. 10 (Lancashire and Yorkshire Railway, &c.) Order, 1892," came into force on January 1, 1893, and applied to the London and North Western Railway.

Sect. 5 : "The company may charge for the services hereunder mentioned, or any of them, when rendered to a trader at his request or for his convenience, a reasonable sum, by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party. Provided that where before any service is rendered to a trader he has given notice in writing to the company that he does not require it, the service shall not be deemed to have been rendered at the trader's request or for his convenience."

"(iv.) The detention of trucks, or the use or occupation of any accommodation, before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandize as carriers thereof, or the consignor or consignee to give or take delivery thereof . . . . And services rendered in connexion with such use and occupation."

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will be given daily to each merchant of the arrival of any wagons consigned to him, at either of the company's yards or depots, or at any of the company's storage sidings or sidings external to a station or yard, where the wagons may be left for the convenience of the consignee. Four days will be allowed free of charge to the consignee to release each wagon, exclusive of the day of arrival. In the event of any wagon not being released within the time limited as above, the consignee will be required to pay siding or standage rent at the rate of 6*d.* per day, or part of a day, for every wagon not so released and remaining on the company's premises."

The defendant had allowed wagons loaded with coal consigned to him, and sent over the plaintiff company's railway, to remain on their premises after the four days specified in the above notice had expired, and the plaintiff company's claim was for siding rent, at the rate of 6*d.* per day per wagon, in respect of the wagons so allowed to remain. The defendant had given no notice to the company that he did not require the accommodation or service.

The deputy judge found that the plaintiff company had demanded the siding rent from the defendant, but that he had always refused to pay, and in fact had never paid it, and that he had always told the company's servant that it was "exorbitant and unjust."

The deputy judge was of opinion that, under those circumstances, the county court had no jurisdiction, but that "the reasonableness of the matter should be determined by an arbitrator appointed by the Board of Trade," and he gave judgment for the defendant.

The plaintiff company appealed.

*W. J. Noble*, for the plaintiffs. The company were not bound to give the defendant accommodation at their sidings after the expiration of the four days specified in their notice of January, 1895. He has been afforded reasonable facilities for taking delivery within s. 2 of the Railway and Canal Traffic Act of 1854 (17 & 18 Vict. c. 31). The Railway Commissioners would be able to say that four days were not enough; but they

have already decided, in the case of another railway, that it is a sufficient time. They could not control the plaintiffs' charge for the accommodation after the four days; it is not a conveyance or terminal charge, and their jurisdiction under s. 2 only extends to the "receiving, forwarding and delivering of traffic." If the defendant chooses to accept the company's services in affording him accommodation at their sidings after the four days, he must pay their charges for those services. The Provisional Order in question does not apply to this case. A reference to arbitration, in case of difference, is not an absolute condition precedent to the company's right to recover. Sect. 5 only comes into operation where there has been no agreement, express or implied, to pay a particular sum. Here the defendant by accepting the company's services, otherwise than as carriers, after the four days must be taken to have agreed to the charge, of which he has had notice. Secondly, on the facts the defendant has never objected to the reasonableness of the plaintiffs' charges; his objection has been to the charge being made at all. Three cases—*Midland Ry. Co.* v. *Haigh* (1), and two others (unreported)—have come before Courts of which Wright J. was a member, and it was pointed out by the Court that these Provisional Orders only give jurisdiction to the arbitrator where there is a difference as to amount; where there is a denial of liability, the railway company may bring their action.

*T. W. Chitty*, for the defendant. There are two things to be taken into consideration in determining whether the charge is reasonable: first, whether the four days is a reasonable time for taking delivery, and, secondly, what rate per day ought to be charged when the time at which the charge ought to commence has been fixed. The reasonableness of the charge involves the question when it ought to commence, and that question, therefore, must under s. 5 of the Provisional Order be determined by the arbitrator. The words in s. 5 give exclusive jurisdiction to the arbitrator in cases to which it applies. It applies not only where there is a difference as to amount, but where the right to make the charge at all is disputed. The charges which are authorized to be made by s. 5, (iv.)

(1) (1896) 13 Times L. R. 135.

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are exclusive charges. This Provisional Order is made under the Railway and Canal Traffic Act, 1888. Sect. 24, sub-s. 10, provides: "The Act of Parliament confirming any Provisional Order made under this section shall be a public general Act, and the rates and charges mentioned in a Provisional Order as confirmed by such Act shall, from and after the Act coming into operation, be the rates and charges which the railway company shall be entitled to charge and make." The Legislature need not have given power to make specified charges for specified purposes if the railway company could, at their own will, at the same time make similar charges of their own.

Secondly, the deputy judge has in effect found as a fact that the defendant's objection was to the reasonableness of the charges, and this Court cannot go behind his finding.

*W. J. Noble*, replied.

WRIGHT J. Questions of difficulty and importance have been raised in this case, which were not argued in the former cases to which our attention has been called—in particular the question, argued for the first time to-day, as to the power of the arbitrator to say whether the four days is enough to allow as an incident of conveyance. I am not obliged to decide these questions here, and shall not do so. There are peculiar circumstances in this case. One ground upon which the former cases were decided is absent in this, because in them we held upon the evidence that the trader had never objected to the quantum of the charge, but had absolutely refused to pay anything, whilst here the deputy county court judge has found—wrongly, as I think, but still he has found it—that the trader made an objection which we must construe as extending to the quantum. There is also the circumstance—which did not exist, so far as I know, in the former cases—that the railway company in 1895 served upon their traders generally, and upon this trader in particular, a notice that after the expiration of four days, which they allotted as properly incident to conveyance, if the trader required wagons loaded with his goods to be kept longer on their premises, they would require a further payment, and, if he did not assent to that, would not give him that service of allowing the wagons to remain unloaded on their premises. I think it is

plain that the railway company is not obliged by law to give that service at all, unless they are ordered by the Railway Commissioners to give it as a reasonable facility for traffic, or unless the necessity for giving it follows upon, as it might, some application in the nature of a complaint of undue preference. If the company are not bound to give the service it is impossible, I think, to hold that s. 5 of the Provisional Order can intend to leave it to an arbitrator to order them to perform a service which no law or statute requires them to perform. If they can refuse to give it at all, it seems to me to follow that they can refuse to give it unless they are paid what they choose to ask for it. It is certainly a serious conclusion, but I can see no other; because if they cannot refuse except upon not being paid such a sum as the arbitrator chooses to say they ought to be paid, that is giving the arbitrator power to tell the company that they must perform these services on his terms, and that is telling them to do what no Act of Parliament requires them to do. I have come to this conclusion with reluctance, because I doubt whether the clause has been so framed as to give the protection it was meant to give to traders; but I think we should be going too far if we held that it gave the arbitrator a power to make it the duty of the railway company to do, on the arbitrator's terms, that which they are not otherwise bound to do at all, and that which the clause does not in terms give the arbitrator any power to order them to do. For that reason I think this appeal must succeed. I do not express any opinion upon the other points which have been raised, and particularly I wish to reserve for consideration the question how far the previous decisions, in the absence of such a notice as is found in this case, would be sustained in view of what has been urged to-day with respect to the language of sub-s. (iv.) of s. 5 of the Provisional Order.

DARLING J. I entirely concur.

*Appeal allowed.*

Solicitor for plaintiffs: *C. H. Mason.*

Solicitor for defendant: *George Turnbull, Bradford.*

W. A.

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*March* 21.

[IN THE COURT OF APPEAL.]

## *In re* THE KENT COALFIELDS SYNDICATE, LIMITED.

*Company—Register of Members—Inspection—Company in Voluntary Liquidation—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 32.

The provisions of s. 32 of the Companies Act, 1862, with regard to the inspection of registers of members do not apply to the case of a company in liquidation.

APPEAL from an order of a judge at chambers.

Application was made, under s. 32 of the Companies Act, 1862 (1), to a judge at chambers to order production, for inspection by the applicant, of the register of members of the Kent Coalfields Syndicate, a company in voluntary liquidation. The applicant was neither a creditor nor a contributory of the company. Grantham J. made the order on the company and the liquidator, who joined in appealing.

*Frank Evans*, for the company. Sect. 32 is in Part II. of

(1) 25 & 26 Vict. c. 89, s. 32: "The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company hereinafter mentioned: except when closed as hereinafter mentioned, it shall during business hours, but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be appointed for inspection, be open to the inspection of any member gratis, and to the inspection of any other person on the payment of one shilling, or such less sum as the company may prescribe, for each inspection; and every such member or other person may require a copy of such register, or of any part thereof, or of such list or summary of members as is hereinbefore mentioned, on payment of sixpence for every hundred words required to be copied: if such inspection or copy is refused, the company shall incur for each refusal a penalty not exceeding two pounds, and a further penalty not exceeding two pounds for every day during which such refusal continues; and every director and manager of the company who shall knowingly authorize or permit such refusal shall incur the like penalty; and in addition to the above penalty, as respects companies registered in England and Ireland, any judge sitting in chambers, or the Vice-Warden of the Stannaries, in the case of companies subject to his jurisdiction, may by order compel an immediate inspection of the register."

the Act, and not in Part IV., which applies to winding-up. It cannot have been intended, where the powers of the directors have ceased under s. 133, and the register is in the custody and control of the liquidator, that the company and the directors should be liable to a fine for not allowing it to be inspected. The question arose in the case of one of the articles of association of a company, in terms similar to those of s. 32, but applying to books of account, and it was held that the article was no longer applicable when the company was in voluntary liquidation: *In re Yorkshire Fibre Co.* (1) Similar considerations arise under s. 25, and other sections in Part II. that impose penalties.

The reason for allowing a stranger to inspect the register is explained by Lord Cranworth in *Oakes* v. *Turquand* (2); but no such reason exists when the company is in liquidation.

The jurisdiction over the liquidator is regulated by the Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), which declares, by s. 32, sub-s. 2, that the expression "the Court" in Part IV. of the Companies Act, 1862, means the Court having jurisdiction to wind up the company. The application was not made to the judge of the High Court appointed to conduct winding-up business, and the order was therefore made without jurisdiction.

[He was stopped.]

*Swinfen Eady, Q.C.*, and *J. R. Atkin*, for the applicant. This application is not made under Part IV. of the Companies Act, 1862, and the only question is whether the provisions of s. 32 of that Act come to an end when the company is in voluntary liquidation. The liability of a company under s. 39 to have a registered office does not cease when they are in liquidation, otherwise in case of a disputed debt it would be impossible to serve a writ, though the penalty under that section may not be enforceable. The difficulty of tracing dealings in shares, and of ascertaining the position of the company, might be very serious unless inspection can be obtained of the register of members, or the register of mortgages required by s. 43.

(1) (1870) L. R. 9 Eq. 650. (2) (1867) L. R. 2 H. L. 325, at p. 365.

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Sect. 156 applies to books and documents, and if registers are included in the term "books," it does not follow that this section was intended to supplant s. 32 in cases of liquidation so as to entirely exclude strangers from inspecting the registers of the company.

[They cited *In re Capital Fire Insurance Association* (1) and *Nelson* v. *Anglo-American Land Mortgage Agency Co.* (2)]

A. L. SMITH L.J. This is an appeal from an order made by my brother Grantham at chambers.

We have had several sections of the Companies Act, 1862, cited to us, but the case seems to me to turn upon s. 32 of that Act, and the question is whether an order can be made under that section for inspection of the register of a company in voluntary liquidation, and not carrying on business at all. At one time it was suggested that s. 156 might be referred to in support of the order, but it has been admitted that that section cannot be relied on, because the applicant is not a creditor or contributory, and if he were the application would have been made to the wrong Court.

It appears to me that the true meaning of s. 32 is that it only applies to a company which has not gone into liquidation. The phraseology of the section seems to me to support this conclusion. It says that the register of members is to be kept at the registered office of the company except when closed as thereinafter mentioned. The closing there mentioned appears by the next section to refer to the time, of which notice is given by advertisement, during which the office is closed, for a period not exceeding thirty days in a year. It seems to me that the language used is not applicable to the case where the register has passed into the hands of the liquidator, and can only apply to a going company. Then the register is to be open to inspection by any member, or by any other person on payment, during business hours for not less than two hours each day. Who are to give the inspection? Clearly the company; and if inspection is refused the company and directors permitting the refusal incur penalties. Why are they to incur penalties when

(1) (1883) 24 Ch. D. 408. (2) [1897] 1 Ch. 130.

they are not in default, and the inspection of the register is under the control of the person carrying on the liquidation? To read the section otherwise than as applicable to a company which is a going concern makes its provisions unreasonable.

It was argued that, assuming s. 156 to apply to a register, that did not do away with the need for s. 32. It would be a strange thing if, in case of a liquidation, a creditor or contributory could only get inspection under order of the Court having supervision of the winding-up, and yet a member of the public, neither creditor nor contributory, could obtain inspection on payment of one shilling or less.

If any authority is wanted in support of the view that s. 32 does not apply when a company is in voluntary liquidation, it may be found in *In re Yorkshire Fibre Co.* (1) For these reasons I think there was no jurisdiction to make this order, and the appeal must be allowed.

CHITTY L.J. I am of the same opinion. On the true construction of s. 32 its provisions do not apply where a company is being wound up, whether under the jurisdiction of the Court or in a voluntary liquidation. The section occurs in a group of sections which relate to a company which is a going concern, and, though not conclusive, that fact is a point to be considered in determining the extent of the application of the section. The expressions used in the section tend to shew that its application is limited, and the latter part of the section relates to penalties as to which it would be unreasonable to say that they should be imposed on a company when it is no longer a going concern, and on directors when they have ceased to have authority over the register. It is quite clear that the register passes into the hands of the liquidator. It is sufficient to refer to *In re Capital Fire Insurance Association* (2) on this point. Sect. 156 was not directly relied on for the applicant, but it was contended that this section applies to books and papers, and though the expression "books" is sufficient to include a register of members that did not shew that s. 32 should cease to have effect when the company is being wound up, since the section is only

(1) L. R. 9 Eq. 650. (2) 24 Ch. D. 408.

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applicable to creditors or contributories. But, in my opinion, these provisions are by way of replacing in certain cases those of s. 32. It is true that sect. 156 does not apply to a voluntary winding-up not under the supervision of the Court, but in such a case the most ample powers are provided by s. 138.

I think the observations of Lord Cranworth in *Oakes* v. *Turquand* (1) are of great weight. He pointed out that under the altered law of liability it was right that a stranger should be able to obtain inspection of the register of members, because he had or might have an interest in knowing who are liable and to what extent, but such a right is unnecessary when a company is being wound up. It is true that the company continues to exist in a corporate capacity, and it is also true that the liquidator may be carrying on the business; but no liquidator would dream of dealing with any person without indicating that the company was in liquidation, and no stranger has, in my opinion, any such interest as I have mentioned after the winding-up has commenced.

The case of *In re Yorkshire Fibre Co.* (2), before James V.-C., has a bearing on the present case, for it was decided on one of the articles of association which was framed in similar terms to the section we have to consider. The cases are analogous, and it was there decided that the article did not apply where the company was being wound up. In my opinion s. 32 was not intended to apply to a company in liquidation so that a stranger should have under it the right of inspection.

COLLINS L.J. I am of the same opinion.

*Appeal allowed.*

Solicitor for applicant: *N. Herbert Smith.*
Solicitors for company: *Lake & Lake.*

(1) L. R. 2 H. L. 325.

(2) L. R. 9 Eq. 650.

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1898
*March* 9, 11.

## CALCRAFT *v.* GUEST.

*Practice—Discovery—Documents—Privilege—Documents in Previous Action—Secondary Evidence.*

The defendant in an action to try a right of fishery, after judgment had been given for the plaintiff, accidentally discovered certain documents prepared for the defence of a previous action dealing with the same subject-matter, which action was defended at the cost of a predecessor in title of the plaintiff's. The plaintiff obtained possession of the documents after copies of them had been taken by the defendant. The defendant having appealed:—

*Held*, (1.) following *Minet* v. *Morgan*, (1873) L. R. 8 Ch. 361, that the documents remained privileged, (2.) following *Lloyd* v. *Mostyn*, (1842) 10 M. & W. 478, that the defendant was not precluded on the ground of privilege from giving secondary evidence of their contents.

*Wheeler* v. *Le Marchant*, (1881) 17 Ch. D. 675, is not inconsistent with *Minet* v. *Morgan*.

THIS action was brought against Mrs. Drax and another for trespass in the several fishery of the plaintiff in the River Frome in Dorsetshire, the substantial question being as to the upper boundary of the plaintiff's fishery. The action was tried by Collins J., who gave judgment for the plaintiff. Mrs. Drax appealed, and gave notice by her solicitors to the plaintiff that she intended to rely upon certain documents in a case of *Fry* v. *Stevens*, which had been discovered since the judgment. These documents included proofs of witnesses and rough notes of evidence used in the defence of that action. The action was tried at the Dorchester Assizes in 1787 and resulted in favour of the plaintiffs. It was an action for assault against three brothers named Stevens, one of whom was tenant of the fishery from Mr. John Calcraft, a predecessor in title of the present plaintiff. The defendants pleaded in justification that they were acting in defence of their fishery rights. Mr. Calcraft defended the action at his own expense, and employed Mr. Thomas Bartlett, jun., as his solicitor.

The documents in question were discovered by Mr. C. L. O.

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Bartlett, a member of the firm of Messrs. Bartlett & Sons, solicitors, of Sherborne, who acted for the appellant in several matters, but did not act for her in the present action. Mr. C. L. O. Bartlett was the grandson of Mr. Thomas Bartlett, jun., who practised as a solicitor at Wareham, and was succeeded by his son Mr. C. O. Bartlett, an uncle of Mr. C. L. O. Bartlett. On the death of Mr. C. O. Bartlett in 1867 this business was wound up and came to an end. Mr. C. L. O. Bartlett acted for his uncle's executors in the winding up of the business, and invited the clients upon payment of their accounts to take away any papers belonging to them. Such of the papers as were not taken away were given to him by his uncle's executors and were stored by him in his coach-house. In October, 1897, after judgment had been given in this action, a search was made for another purpose amongst these papers, and the documents relating to the case of *Fry* v. *Stevens*, were discovered. Mr. Bartlett immediately communicated with the solicitors who acted for the appellant in this action, and they inspected the documents and took copies of them. The documents were ultimately handed over to the plaintiff under a threat of legal proceedings. Upon the appeal two questions arose as to these documents: first, whether they were privileged from production; secondly, whether it was competent for the appellant to give secondary evidence of them.

*Cozens-Hardy, Q.C.*, and *Macaskie* (*Bosanquet, Q.C.*, with them) for the appellant. (1.) These documents having found their way accidentally into the hands of the appellant, and the appellant having taken copies of them, such copies are admissible if the respondent resists production on the ground of privilege: Taylor on Evidence, vol. i. 9th ed. § 922; *Bishop of Meath* v. *Marquis of Westminster* (1); *Lloyd* v. *Mostyn*. (2) Privilege does not affect the admissibility of evidence, though it may make it impossible to procure it.

(2.) These documents not having been prepared with a view to this litigation, are not within the doctrine of privilege as

(1) (1836) 4 Cl. & F. 445, 537.

(2) 10 M. & W. 478, 481.

defined in *Wheeler* v. *Le Marchant* (1), which must be treated as qualifying *Minet* v. *Morgan*. (2)

*Cripps, Q.C.*, and *Stuart A. Moore*, for the respondent. Where a document has been confidentially prepared for the purposes of a former litigation dealing with the same subject-matter, and is privileged from production on that ground, the privilege is not lost in the subsequent litigation: *Minet* v. *Morgan* (2); *Nordon* v. *Defries* (3); nor is the privilege destroyed because the solicitor has wrongfully handed over the document to the other side. If it is open to any party who has wrongfully come into possession of a privileged document to give secondary evidence of its contents, the privilege, though still existing, may be defeated in every case.

*Cozens-Hardy, Q.C.*, replied.

*Cur. adv. vult.*

March 11. LINDLEY M.R. In the course of this appeal a question has arisen as to whether certain documents are privileged by reason of their being confidential communications, as I will call them, and, if they are, whether secondary evidence can be given of some of them of which the appellants have copies.

We must be a little cautious in what we say, because we shall have to consider each particular document when it is tendered in evidence, and it may be that some of them are not admissible on other grounds. Therefore, I shall confine my remarks entirely to the question of professional privilege and the right to give secondary evidence of documents so privileged.

Now, as regards professional privilege, on looking at the authorities, it appears to me that this case is covered by the case of *Minet* v. *Morgan* (2), and that if there are any documents which were protected by the privilege to which I am alluding that privilege has not been lost. I take it that, as a general rule, one may say once privileged always privileged. I do not mean to say that privilege cannot be waived, but that the mere fact that documents used in a previous litigation are

(1) 17 Ch. D. 675. (2) L. R. 8 Ch. 361.
(3) (1882) 8 Q. B. D. 508.

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held and have not been destroyed does not amount to a waiver of the privilege. I think that so far as regards professional privilege *Minet* v. *Morgan* (1) covers these documents. It is said that *Wheeler* v. *Le Marchant* (2) shews the contrary. I do not think so. It seems to me that *Wheeler* v. *Le Marchant* (2) has been a little misunderstood. I think that *Wheeler* v. *Le Marchant* (2) was perfectly right. An attempt was there made to extend the doctrine of professional privilege to documents which were not covered upon any proper understanding of the doctrine. Looking at Cotton L.J.'s judgment and at the form of order which he drew up in that case, I think that that will be seen without difficulty. No doubt *Wheeler* v. *Le Marchant* (2) has given rise to some controversy, and Cotton L.J. has referred to it in the case of *Kennedy* v. *Lyell* (3), where he says this: "What was said by the Master of the Rolls is rather in favour of the respondent; but all that was decided was that communications between the solicitors and the surveyor of the client before any litigation was contemplated were not protected." Then he goes on to other matters. The case was again referred to by Denman J. and Charles J. in *Lowden* v. *Blakey* (4), where it was again pointed out that there was nothing in *Wheeler* v. *Le Marchant* (2) that was in any way inconsistent with *Minet* v. *Morgan* (1); nor is there when that case is properly understood. Again, Stirling J. carefully considered *Wheeler* v. *Le Marchant* (2) in the case of *Learoyd* v. *Halifax Joint Stock Banking Co.* (5), and he came to the conclusion, which is inevitable upon a careful comparison of the two cases, that *Wheeler* v. *Le Marchant* (2) was right, and that *Minet* v. *Morgan* (1) was right too—that is to say, that they did not conflict. Therefore, so far, *Minet* v. *Morgan* (1) may be prayed in aid as protecting these privileged documents.

Then comes the next question. It appears that the appellant has obtained copies of some of these documents, and is in a position to give secondary evidence of them; and the question is whether he is entitled to do that. That appears to me to be

(1) L. R. 8 Ch. 361.
(2) 17 Ch. D. 675.
(3) (1883) 23 Ch. D. 387, 407.
(4) (1889) 23 Q. B. D. 332.
(5) [1893] 1 Ch. 686, 690.

covered by the authority of *Lloyd* v. *Mostyn*. (1) I need not go closely into the facts of that case. That was an action on a bond which was said to be privileged from production on the ground of its having come into the hands of the solicitor in confidence, and the learned judge at the trial allowed the objection, and nobody seems to have quarrelled with it. The plaintiff then tendered in evidence a copy of the bond, and proposed to give secondary evidence of it. This was rejected on the ground that notice to produce was necessary. The plaintiff then proved a notice to produce, the sufficiency of which was disputed. The learned judge being of opinion that the notice was sufficient, held that the copy was admissible, and the jury found a verdict for the plaintiff for the full amount of the bond, leave being given to the defendant to move to enter a nonsuit if the Court should be of opinion that the copy of the bond ought not to have been received in evidence. In support of the motion to enter a non-suit Sir Fitzroy Kelly relied on a passage in Phillipps on Evidence, 8th ed. p. 182, and a case there cited of *Fisher* v. *Heming*, decided by Bayley J. at Nisi Prius in 1809. That passage runs as follows: "If a deed deposited confidentially with an attorney has been obtained out of his hands for the purpose of being produced in evidence by another witness, it cannot be received. Thus, in a case tried before Bayley J., the plaintiff's counsel having proved a certain deed in the possession of the defendant, and the defendant refusing to produce it, though he admitted having received notice, the counsel of the plaintiff offered in evidence a copy of the deed, which had been obtained from one who many years ago acted as an attorney for the person under whom the defendant claimed, and who had been intrusted by him with the original deed in his professional character. The counsel on the part of the defendant objected that this evidence ought not to be received, as the original deed had been deposited confidentially with the attorney; and Bayley J. refused to admit it. He said, the attorney could not give parol evidence of the contents of the deed which had been intrusted to him; so neither could he furnish a copy. He ought not to have communicated to

(1) 10 M. & W. 478.

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others what was deposited with him in confidence, whether it was a written or verbal communication. It is the privilege of his client, and continues from first to last." That is the passage from Phillipps on Evidence. Upon that Parke B. said: "I have always doubted the correctness of that ruling. Where an attorney intrusted confidentially with a document communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced. Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?" The matter dropped there; but the other members of the Court (Lord Abinger, Gurney B., and Rolfe B.) all concurred in that, which I take it is a distinct authority that secondary evidence in a case of this kind may be received.

These, therefore, are the answers which ought to be given to the two points submitted to us; and when any particular document is tendered, we must consider what we ought to do with it having regard to these principles.

RIGBY and VAUGHAN WILLIAMS L.JJ. concurred.

Solicitors: *Nicholson, Graham & Graham, for Preston & Francis, Bournemouth; Meynell & Pemberton.*

H. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1898
*March* 26.

## DURHAM BROTHERS *v.* ROBERTSON.

*Assignment of Debt—Mortgage—Absolute Assignment with Proviso for Redemption—Implication of Power to Redeem—Assignment of Part of an entire Debt—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

A mortgage of debts due to the mortgagor, made in the ordinary form with a proviso for redemption and reassignment upon repayment to the mortgagor, is "an absolute assignment (not purporting to be by way of charge only)" within s. 25, sub-s. 6, of the Judicature Act, 1873.

*Tancred* v. *Delagoa Bay and East Africa Railway*, (1889) 23 Q. B. D. 239, approved.

Where there is an absolute assignment of a debt, but by way of security, a right to a reassignment on redemption will be implied, and s. 25, sub-s. 6, of the Judicature Act, 1873, is applicable to such an assignment.

*Quære*, whether an assignment of part of an entire debt is within the enactment.

Judgment of Lord Coleridge C. J. in *Brice* v. *Bannister*, (1878) 3 Q. B. D. 569, questioned.

A firm of builders delivered to the plaintiffs a document in the following terms: "*Re* Building Contract, South Lambeth Road.—In consideration of money advanced from time to time we hereby charge the sum of 1080*l*., which will become due to us from John Robertson on the completion of the above buildings, as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you." The plaintiffs gave notice to the John Robertson named in the document, and brought this action against him to recover the amount:—

*Held*, that the document was not "an absolute assignment (not purporting to be by way of charge only)" within s. 25, sub-s. 6, of the Judicature Act, 1873, and that the plaintiffs could not recover in the action.

APPEAL from the judgment of Wills J. at the trial of the action without a jury.

The defendant entered into a building contract on April 1, 1895, with contractors, Smith & Co., under which it was stipulated that the contractors should build certain houses which were to be leased to them at a ground-rent of 150*l*. One of the clauses of the contract gave the contractors the option of paying an additional ground-rent of 60*l*. in consideration of

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which they were to receive from the defendant a sum of 1080*l.* On August 19 of the same year the contractors wrote to the plaintiffs in the following terms: "*Re* Building Contract of Middle Class Dwellings situate on the west side South Lambeth Road.—In consideration of money advanced from time to time we hereby charge the sum of 1080*l.*, being the agreed price for the sale of 60*l.* per annum ground-rent which will become due to us from John Robertson, Esq., of No. 73, Rosendale Road, West Dulwich, on the completion of the above buildings as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you." The plaintiffs gave notice of the assignment to the defendant, the John Robertson named therein, and this action was brought against him to recover the amount which it was alleged had, in the events that happened, become due. The defence was a denial that the amount ever became payable to the contractors under their building contract, and, secondly, that there was no valid assignment of the sum within s. 25, sub-s. 6, of the Judicature Act, 1873.

The learned judge gave judgment for the plaintiffs on both points.

The defendant appealed.

The arguments on the question of fact whether the amount became payable and so much of the judgments as related to that question are omitted.

1898. Jan. 20. *Marshall, Q.C.*, and *Pollard* (with them *Hugo Marshall*), for the defendant. Sect. 25, sub-s. 6, of the Judicature Act, 1873, gives a right of action to the assignee on "an absolute assignment (not purporting to be by way of charge only)." The document on which the plaintiffs rely is not such an assignment. It purports to be a charge, and though the expression "assign" is used, that is qualified by the words that follow it. To bring a case within the section there must be either an express power to give a receipt for the money, or an order to pay directly to the person named which would empower him to give a receipt, or an actual assignment by way of mortgage which gives the right to the mortgagee to

sue in his own name. This document does not shew that the plaintiffs can give a legal discharge for the debt. Further, there was neither a debt nor an existing chose in action, because the contractors had an option whether they would pay the improved ground-rent, and were not bound to carry out the arrangement which would entitle them to the 1080*l.*

[They cited *Tooth* v. *Hallett.* (1)]

*Jelf, Q.C.*, and *Cranston*, for the plaintiffs. The words at the end of the letter are equivalent to a proviso for redemption, and do not affect the absolute character of the words, "we hereby assign."

The document purports on the face of it to assign the debt, and it is not the less an absolute assignment because it contains, like any other mortgage, provisions that shew that it is only a security, and that there is a right to redeem. It is clear on the authorities that a mortgage with a power of redemption is an absolute assignment within the section.

[They cited *Burlinson* v. *Hall* (2); *Walker* v. *Bradford Old Bank* (3); *Harding* v. *Harding* (4); *Tancred* v. *Delagoa Bay and East Africa Railway* (5); *Comfort* v. *Betts.* (6)]

*Marshall, Q.C.*, in reply.

*Cur. adv. vult.*

1898. March 26. A. L. SMITH L.J. read the following judgment:—

I agree in the result of the judgment about to be delivered by my brother Chitty, and that the letter of August 19, 1895, sued on by the plaintiff does not constitute an absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of a debt, within the meaning of s. 25, sub-s. 6, of the Judicature Act, 1873.

I agree with the judgment of Wills J., and with the judgment which my brother Chitty is about to deliver, that the point taken by the defendant that the 1080*l.* did not become payable under the agreement of April 1, 1895, is ill-founded,

(1) (1869) L. R. 4 Ch. 242.
(2) (1884) 12 Q. B. D. 347.
(3) (1884) 12 Q. B. D. 511.
(4) (1886) 17 Q. B. D. 442.
(5) 23 Q. B. D. 239.
(6) [1891] 1 Q. B. 737.

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and does not, therefore, avail the defendant as a defence to this action.

As, however, the plaintiffs cannot bring themselves within the 25th section of the Judicature Act, 1873, so as to entitle them to sue at law upon the agreement sued on, their action, which is plainly an action at law, must be dismissed, and the appeal of the defendant allowed.

CHITTY L.J. read the following judgment :—

This is an appeal by the defendant Robertson against a judgment whereby the plaintiffs Durham Brothers recovered judgment for a sum of 1080*l.* The action was tried by Wills J. without a jury. The plaintiffs' claim was that under a building contract dated April 1, 1895, made between the defendant, the building owner, and Smith & Co., the contractors, the sum of 1080*l.* became payable, in the events which had happened, on August 18, 1896, as a premium or purchase-money for an improved or additional ground-rent of 60*l.*; that this sum before it became payable had been duly assigned by Smith & Co. to the plaintiffs by writing within the meaning of the Judicature Act, 1873, s. 25, sub-s. 6, and that due notice of the assignment had been given to the defendant. There was no question about the notice. The defences relied upon on the appeal were in substance, first, a denial that the sum of 1080*l.* ever became payable under the building contract; and, secondly, that there was no valid assignment of that sum within the Act. Smith & Co. were not parties to the action, nor was George Tapley Smith, to whom a lease, at the improved ground-rent, was in fact granted on August 18, 1896. Wills J. decided both points in favour of the plaintiffs.

Both points were raised on the appeal. The second point as to the assignment was first argued. Mr. Jelf, for the respondents, admitted (and rightly) that if the decision on this point was adverse to his clients the appeal must succeed. But, on consideration, it appeared to us that a decision on this point alone would be unsatisfactory, because it would leave the other point still open to controversy in some further litigation between the parties. Consequently, the argument on the other point

was resumed and concluded; and we now proceed to give judgment on both the questions.

I will follow the course of the argument, and deal first with the point as to the assignment; and I shall assume throughout this part of the judgment that the sum of 1080*l.* did become payable under the building contract of April 1, 1895.

The document, relied on by the plaintiffs as an assignment within the Act, is a letter dated August 19, 1895, written by Smith & Co. to the plaintiffs. It runs thus: "*Re* Building Contract of Middle Class Dwellings, situate on the west side South Lambeth Road, S.W.—In consideration of money advanced from time to time we hereby charge the sum of 1080*l.*, being the agreed price for the sale of 60*l.* per annum ground-rent which will become due to us from John Robertson, Esq., of No. 73, Rosendale Road, West Dulwich, on the completion of the above buildings as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you."

Now the document divides itself into two parts. First, there is a charge upon 1080*l.* for the advances; and, secondly, there is an assignment of the interest of Smith & Co. in the 1080*l.* in terms not absolute, but until the happening of an event, namely, the repayment of the advances with interest. On repayment of the advances and interest the assignment, according to the import of the document, comes to an end.

Dealing with the case apart from the Judicature Act, there is here unquestionably a valid equitable assignment. To operate as an equitable assignment no particular form of words is required in the document: an engagement or direction to pay, out of a debt or fund, a sum of money constitutes an equitable assignment, though it does not operate as an assignment of the whole fund or debt. A mere charge on a fund or debt operates as a partial equitable assignment. As is well known, an ordinary debt or chose in action before the Judicature Act was not assignable so as to pass the right of action at law, but it was assignable so as to pass the right to sue in equity. In his suit in equity the assignee of a debt, even where the assignment was absolute on the face of it, had to make his assignor, the

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original creditor, party in order primarily to bind him and prevent his suing at law, and also to allow him to dispute the assignment if he thought fit. This was a fortiori the case where the assignment was by way of security, or by way of charge only, because the assignor had a right to redeem. Further, the assignee could not give a valid discharge for the debt to the original debtor unless expressly empowered so to do. The original debtor, whether he admitted the debt or not, was not concerned with the state of the accounts between the assignor and the assignee where the debt was assigned by way of security; and the rule was that where he did not dispute the debt he should have his costs of suit out of the debt: he was regarded in the light of a stakeholder. It is unnecessary to cite authorities in support of any of the above propositions.

Now it was in order to afford some remedy for this state of the law that sub-s. 6 was passed. It is plain on reading it that it does not apply to every case of equitable assignment of a debt or chose in action.

Two matters, as is apparent on the face of it, had to be regarded: first, the simplifying the remedy in favour of the assignee; and, secondly, the protection of the original debtor.

With these preliminary observations, which I have made for the purpose of explaining the language of the sub-section, which at first sight seems peculiar if not awkward, I proceed to examine the sub-section itself: "Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor." This is followed by a proviso that if the debtor (I omit the other

words) shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the claimants to interplead, or he may pay the debt into court under the Trustee Relief Act.

No argument was addressed to us founded on this proviso. It appeared, from the evidence put in at the trial, that under an agreement in August, 1896, connected with the original building contract, George Tapley Smith (not a member of the contractors' firm) had or might have a claim to the 1080*l.* in question in this action, or to a sum of like amount; and we were informed by counsel during the argument on the appeal, that he had issued a writ against the defendant Robertson to recover that sum. But the defendant has taken no step in this action calling on the parties to interplead, supposing that he had a right so to do, which he had not, as he disputed the debt. In these circumstances no question arises on the proviso, and it may be left out of consideration.

To bring a case within the sub-section transferring the legal right to sue for the debt and empowering the assignee to give a good discharge for the debt, there must be (in the language of the sub-section) an absolute assignment not purporting to be by way of charge only. It is requisite that the assignment should be, or at all events purport to be, absolute, but it will not suffice if the assignment purport to be by way of charge only. It is plain that every equitable assignment in the wide sense of the term as used in equity is not within the enactment. As the enactment requires that the assignment should be absolute, the question arose whether a mortgage, in the proper sense of the term, and as now generally understood, was within the enactment. In *Tancred* v. *Delagoa Bay and East Africa Railway* (1) there was an assignment of the debt to secure advances with a proviso for redemption and reassignment upon repayment. It was there held by the Divisional Court (disapproving of a decision in *National Provincial*

(1) 23 Q. B. D. 239.

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*Bank* v. *Harle* (1)), that such a mortgage fell within the enactment. It appears to me that the decision of the Divisional Court was quite right. The assignment of the debt was absolute: it purported to pass the entire interest of the assignor in the debt to the mortgagee, and it was not an assignment purporting to be by way of charge only. The mortgagor-assignor had a right to redeem, and on repayment of the advances a right to have the assigned debt reassigned to him. Notice of the reassignment pursuant to the sub-section would be given to the original debtor, and he would thus know with certainty in whom the legal right to sue him was vested. I think that the principle of the decision ought not to be confined to the case where there is an express provision for reassignment. Where there is an absolute assignment of the debt, but by way of security, equity would imply a right to a reassignment on redemption, and the sub-section would apply to the case of such an absolute assignment. In a well-known judgment of the Exchequer Chamber in *Halliday* v. *Holgate* (2), the late Willes J., in delivering the judgment of the Court, distinguished between lien, pledge, and mortgage, and spoke of a mortgage as passing the property out and out. A mortgage is not mentioned in the enactment; but where there is an absolute assignment of the debt, the limiting words as to a charge only are not sufficient to exclude a mortgage. The respondent's counsel cited a passage from Fisher on Mortgages and from Wharton's Dictionary to the effect that a mortgage was a conditional conveyance. In bygone days mortgages were made by a conveyance subject to a condition making it void if the money was repaid within six months; but mortgages in this form had become obsolete long before the Judicature Act, 1873, was passed. The form was abandoned because of the difficulty in ascertaining in whom the legal estate was vested, the title being made to depend on the fact whether the money was or was not paid within the time limited by the condition.

The assignment before us complies with all the terms of the

(1) (1881) 6 Q. B. D. 626.

(2) (1868) L. R. 3 Ex. 299.

enactment save one, which is essential: it is not an absolute but a conditional assignment. The commonest and most familiar instance of a conditional assurance is an assurance until J. S. shall return from Rome. The repayment of the money advanced is an uncertain event, and makes the assignment conditional. Where the Act applies it does not leave the original debtor in uncertainty as to the person to whom the legal right is transferred; it does not involve him in any question as to the state of the accounts between the mortgagor and the mortgagee. The legal right is transferred, and is vested in the assignee. There is no machinery provided by the Act for the reverter of the legal right to the assignor dependent on the performance of a condition; the only method within the provisions of the Act for revesting in the assignor the legal right is by a retransfer to the assignor followed by a notice in writing to the debtor, as in the case of the first transfer of the right. The question is not one of mere technicality or of form: it is one of substance, relating to the protection of the original debtor and placing him in an assured position.

It is necessary to refer to *Brice* v. *Bannister*. (1) In that case there was an assignment of 100*l.* out of money due or to become due to the assignor under a contract to build a ship, with an express power to give a good discharge to the debtor. Lord Coleridge C.J. held that the assignment was within the 25th section. The Court of Appeal decided the case quite apart from the Act. Cotton L.J. expressly decided the case on the ground of equitable assignment. That is shewn by the opening sentence of his judgment, where he says that the letter was a good equitable assignment. Bramwell L.J. reluctantly assented to this view. Brett L.J. dissented, but on general principles. So soon as it was ascertained that there was a good equitable assignment, with power to give a discharge, it became unnecessary to consider whether it fell within the Act or not. In *Ex parte Nichols* (2) the present Master of the Rolls, referring to this decision, treated the assignment as an equitable assignment. He said that the decision was founded

(1) 3 Q. B. D. 569. (2) (1883) 22 Ch. D. 782, at p. 787.

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on the principle that the right of an equitable assignment of a debt cannot be defeated by a voluntary payment by the debtor to the assignor. The decision of Lord Coleridge C.J. in *Brice* v. *Bannister* (1), that the case fell within the 25th section, appears to me to be open to question. The assignment purported to be by way of charge only. It was a direction to pay the 100*l.* out of money due or to become due. No doubt it purported to be a charge of an unredeemable sum of 100*l.*; but still it was a charge. The section speaks of an absolute assignment of any debt or other chose in action. It does not say "or any part of a debt or chose in action." It appears to me as at present advised to be questionable whether an assignment of part of an entire debt is within the enactment. If it be, it would seem to leave it in the power of the original creditor to split up the single legal cause of action for the debt into as many separate legal causes of action as he might think fit. However, it is not necessary to decide the point in the present case, and I leave it open for future consideration.

The result then, thus far, is this: the plaintiffs' assignment is not within the Act, and they had no legal right to sue for it. The assignment, however, is a valid equitable assignment, but by way of security only, and without power to give a valid discharge to the debtor. No relief can be given to the plaintiffs in this action as it is constituted. It is admitted as between the parties to this action that considerably less than 1080*l.* is due to the plaintiffs in respect of their advances. In the absence of Smith & Co. the amount due from them to the plaintiffs cannot be ascertained. An account taken in this action of the advances would not bind Smith & Co. Nor could the matters in question, on the footing that the plaintiffs have a mere equitable assignment, be finally determined in the absence of George Tapley Smith, who has or seems to have had an adverse claim to the 1080*l.* under the documents of August 18, 1896. Mr. Jelf was unquestionably right when he admitted that the plaintiffs' case failed unless it came within the 25th section. The trial has taken place, and it is not possible now to make any amendment by adding parties or otherwise.

(1) 3 Q. B. D. 569.

[The Lord Justice then dealt with the question whether the 1080*l.* had become payable, and confirmed the view taken by the learned judge at the trial, and continued :—]

The result is that the plaintiffs fail in the action. The appeal must be allowed, and judgment entered for the defendant.

COLLINS L.J. I agree, except that I pronounce no opinion on the question whether an assignment of a part of a debt is within s. 25, sub-s. 6, of the Judicature Act, 1873.

*Appeal allowed.*

Solicitors for plaintiffs : *Forbes & Son.*

Solicitors for defendant : *Marshall & Marshall.*

A. M.

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## ANDREW *v.* ST. OLAVE'S BOARD OF WORKS.

1898 *March* 29.

*London—Public Health—Nuisance—Abatement Notice—Service of on Person not Liable—Work done in Obedience to Notice—Recovery of Expense from Person Liable—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 4, *sub-ss.* 1, 4; *s.* 11, *sub-s.* 1.

By s. 4, sub-s. 1, of the Public Health (London) Act, 1891, the sanitary authority may in certain cases serve upon the owner or occupier of premises upon which a nuisance exists a notice requiring him to abate the same; and by sub-s. 4, if the person served with such a notice "makes default in complying" with it, he is to be liable to a penalty whether any nuisance order is made upon him or not. By s. 11, sub-s. 1, "All reasonable costs and expenses incurred in serving a notice, making a complaint, or obtaining a nuisance order, or in carrying the order into effect, shall be deemed to be money paid for the use and at the request of the person on whom the order is made; . . . . or if no order is made . . . . then of the person by whose act default or sufferance the nuisance was caused."

The drainage of two adjoining houses situate in the metropolis being so defective as to be a nuisance, the sanitary authority served a notice under s. 4, sub-s. 1, of the Public Health (London) Act, 1891, upon the owner of the houses requiring him to abate the nuisance. The drainage of the houses was carried away by means of a single pipe, and the owner, being under the belief that this combined system of drainage had been authorized by an order of the sanitary authority, and that the liability to repair the pipe consequently lay upon him under the provisions of the Metropolis Local Management Act, 1855, executed the works prescribed by the notice. In fact, the combined plan of drainage had not been

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authorized by any such order, and the liability to repair the pipe was by that Act imposed upon the sanitary authority. On discovery of the mistake he sought to recover from the sanitary authority the expense he had incurred :—

*Held*, (1.) that as non-compliance with the notice would have rendered him primâ facie liable to a penalty under s. 4, sub-s. 4, of the Act of 1891, he was practically compelled to do the work, and that he could consequently recover the expense as money paid at the sanitary authority's request; (2.) that the "expenses of carrying the order into effect" mentioned in s. 11 include the expenses of doing work in obedience to an abatement notice, and that consequently the owner, whether he was compelled to do the work or not, could under that section recover the expense from the sanitary authority as the persons by whose default the nuisance was caused.

*Gebhardt* v. *Saunders*, [1892] 2 Q. B. 452, followed.

APPEAL from the Southwark County Court.

The plaintiff was the owner of two houses, Nos. 5 and 6, Vine Street, in the parish of St. John, Southwark, and within the district of the defendants. On April 14, 1897, the defendants, as the sanitary authority, having found that the drainage of those two houses was defective, gave him notice of that fact, and on May 27 they served on him two notices under s. 4 of the Public Health (London) Act, 1891, addressed to the owner or occupier of each house respectively, stating that the defective drainage was such as to be a nuisance, and requiring him within fourteen days to abate the same, and for that purpose to redrain the premises into the common sewer, and that in default a summons would be issued requiring him to answer a complaint. The plaintiff on receipt of the notices consulted his surveyor, a Mr. Coles, who opened the ground, and then discovered that the drainage of the two houses was effected by means of a single pipe. Mr. Coles then claimed that in consequence of that fact the pipe in question was, under the provisions of the Metropolis Local Management Act, 1855, a sewer which the defendants, and not the plaintiff, were liable to repair. The defendants in reply referred him to the office of the London County Council; and on June 12 Mr. Coles wrote to the defendants to say that he had been to the office, and there found a plan of combined drainage for Nos. 5 and 6, Vine Street, approved by the Commissioners of Sewers in 1853,

and that he would accordingly proceed to do the work at once. After the plaintiff had done the work he found that he had been mistaken in supposing that the drainage of his houses had been combined under an order of the commissioners. The Nos. 5 and 6, Vine Street, referred to in the order of 1853, were not the plaintiff's houses, the numbering of the street having been altered since that date. The plaintiff accordingly brought this action to recover from the defendants, as the persons liable for the repair of the pipe, the sum of 24*l.* 9*s.* 2*d.*, being the amount of the expenses to which he had been put in doing work which ought to have been done by them. The county court judge gave judgment for the defendants. The plaintiff appealed.

*W. E. Ball*, for the plaintiff. If the pipe which drained the two houses had been laid under an order for combined drainage, it would have been a drain by virtue of the provisions of s. 250 of the Metropolis Local Management Act, 1855, and the plaintiff would have been liable to repair it under s. 85 of that Act; but as there was no order it was a sewer, and the liability lay under s. 69 of that Act on the defendants. The plaintiff, having been served with a notice to abate the nuisance arising from the disrepair of the pipe, was practically compelled to do the work, for non-compliance with that notice would have entailed a penalty under s. 4, sub-s. 4 (1) of the Act

(1) By s. 4, sub-s. 1, of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), "On the receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act default or sufferance the nuisance arises or continues, or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises, requiring him to abate the same within the time specified in the notice, and to execute such works and do such things as may be necessary for that purpose. . . . ."

By sub-s. (4), "Where a notice has been served on a person under this section and . . . . (*b*) such person makes default in complying with any of the requisitions of the notice within the time specified, he shall be liable to a fine not exceeding ten pounds for each offence, whether any such nuisance order as in this Act mentioned is or is not made upon him."

By s. 5, on non-compliance with the notice complaint is to be made by the sanitary authority, and the petty

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of 1891 whether a nuisance order was made or not. Then, if so, the plaintiff was compelled to expend money upon work which the defendants were legally compellable to do, and according to the ordinary rule of the common law he may recover back that expenditure as money paid at the defendants' request. Again, independently of the common law principle, the defendants are liable to repay the money under s. 11, sub-s. 1, of the Act of 1891. The expenses incurred "in carrying the order into effect" include the expenses of carrying an abatement notice into effect where no nuisance order has been made. The policy of the Act was to secure that a nuisance should be abated immediately upon its arising. The person on whom the notice is served, as being the person primâ facie liable, is to do the work at once, and not to wait and litigate the question of liability inter partes before doing it. The ultimate liability is a matter to be settled later on. That is why s. 1 came to be inserted. The case is covered by the authority of *Gebhardt* v. *Saunders* (1), which case was not cited before the county court judge. There a nuisance arose from a defect in a drain of a structural nature, and under s. 4, sub-s. 3, notice to abate ought to have been served on the owner. By mistake it was served on the occupier, who in obedience to it did the work. It was held that he might recover the expense from the owner, both under s. 11, and also at common law on the ground that he had been compelled to do work which the owner was legally compellable to do.

*Macmorran, Q.C.*, for the defendants. The plaintiff was not legally compelled to do the work. Service of an abatement notice without more, imposes no liability upon the person served. If the plaintiff had refused to comply with the notice

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sessional court may make a nuisance order.

By s. 11, sub-s. 1: "All reasonable costs and expenses incurred in serving a notice, making a complaint, or obtaining a nuisance order, or in carrying the order into effect, shall be deemed to be money paid for the use and at the request of the person on whom the order is made; . . . . or, if no order is made, but the nuisance is proved to have existed when the notice was served or the complaint made, then of the person by whose act default or sufferance the nuisance was caused. . . . ."

(1) [1892] 2 Q. B. 452.

the magistrate would have had no power to fine him. He did the work under a mistake not induced by any representation on the part of the defendants. They are not in any way estopped from alleging that the plaintiff's act was voluntary. As to the other ground of claim under s. 11, the suggestion that the word "order" is to be read as including "notice" is untenable. The section only contemplates the recovery of expenses incurred by the sanitary authority from other persons, and not the recovery of expenses incurred by other persons from the sanitary authority. The meaning of the section is that where the sanitary authority obtain an order they may recover all the specified heads of expense, but where no order is made they are to recover such of the specified heads of expense as are applicable, namely, those of serving the notice and making the complaint, if any. The case of *Gebhardt* v. *Saunders* (1) was wrongly decided.

LORD RUSSELL of KILLOWEN C.J. This is a case of considerable complication and difficulty, and I cannot say that in delivering the judgment which I now do I am free from doubt. The facts are these. The plaintiff was owner of the houses Nos. 5 and 6, Vine Street, and in connection with those houses a nuisance had arisen which was attributable to the defective state of the drains or sewers, whichever they were, by which the sewage of those houses was carried away. The matter was one, therefore, which required to be dealt with promptly, because unless promptly dealt with it would be a source of danger to health and possibly to life, and accordingly the defendants as the sanitary authority served notices addressed to the owners or occupiers of the respective houses requiring them to redrain the premises into the common sewer. At that time it was impossible for any one to determine from a casual inspection of the premises whether the defective pipes from which the nuisance arose were drains or sewers, and who was consequently the party responsible for their defective condition. If each of the houses was drained by a separate pipe, that pipe was a drain and not a sewer, and the liability would fall upon

(1) [1892] 2 Q. B. 452.

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the owner. Again, if the two houses were drained by a single pipe, and that combined system of drainage had been authorized by an order of the sanitary authority, the pipe would be a drain and the liability would fall on the owner. But if the houses were drained by such a combined system of drainage without an order of the sanitary authority, the pipe which carried off the sewage would be a sewer and not a drain, and the sanitary authority would be liable for its defective condition. Upon receiving the notices the plaintiff's surveyor, who found that the two houses were drained by means of a single pipe, claimed that the pipe in question was a sewer and not a drain. The sanitary authority referred him to the records at the office of the London County Council, and he accordingly searched those records, when he discovered what he thought to be an order authorizing a combined system of drainage for these two houses, and he communicated the fact of his supposed discovery to the defendants and proceeded to do the required work. There is no suggestion that the defendants were in any way prejudiced or altered their position in consequence of that communication, so as to raise an estoppel against the plaintiff if the facts stated were incorrect. But as a fact it turned out that the supposed discovery was a mistake, and that the order appearing in the records as authorizing a combined plan of drainage for Nos. 5 and 6, Vine Street referred to two wholly different houses, the numbering of the houses in the street having been altered since the date at which that order was made. The consequence was that, as there was no order authorizing the combined drainage, the nuisance arising from the defective pipe was owing to the default of the sanitary authority themselves. But before the mistake was discovered the plaintiff had expended money upon work which ought to have been done by the defendants. The question is whether the plaintiff is legally entitled to recover that money from the defendants. That turns upon the construction which is to be put upon ss. 4 and 11 of the Public Health (London) Act, 1891. Sect. 4 provides in sub-s. 1 that the sanitary authority, if satisfied of the existence of a nuisance, may serve a notice on the person by whose act, default, or sufferance the nuisance

arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring them to abate the same. And sub-s. 4 of the same section provides that where a notice has been served on a person under this section, and (*b*) such person makes default in complying with any of the requisitions of the notice, he shall be liable to a fine not exceeding 10*l*., whether any nuisance order is made on him or not. It was contended on behalf of the defendants that that section does not empower the magistrate, before whom a complaint of non-compliance with an abatement notice is laid, to fine the person on whom the notice was served unless there is clear proof that that person was legally responsible for the existence of the nuisance. But with that I do not agree. Though far from suggesting that it is not matter of defence to such a complaint to shew that some other person and not the person served was responsible for the nuisance, I think that, in the absence of production by the persons summoned of evidence to that effect, the magistrate has jurisdiction to inflict a penalty on mere proof of non-compliance with the notice. In other words, I look upon the section as putting upon the person served, not for all time, but primâ facie and for the time being, the liability to do what it is necessary should promptly be done, leaving the question of his ultimate liability to be dealt with subsequently. That was the view which was taken by Day and Charles JJ. in the case of *Gebhardt* v. *Saunders*. (1) I agree with what was there said by Day J.: "Common sense and the necessity of the case made it necessary for something to be done forthwith, and as either the plaintiff or the defendants were bound to do that something the plaintiff proceeded to do it; had he not done so he would have been liable under s. 4, sub-s. 4, of the Act of 1891 to a penalty of 10*l*." Then, if that is the right construction to put on the section, the plaintiff in this case was compelled to do work which admittedly the defendants were legally compellable to do. And under those circumstances the common law provides that the defendants should be required to recoup the plaintiff for the expenses to which he has been put in

(1) [1892] 2 Q. B. 452.

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consequence of their default. Also, I think that whether the plaintiff was compelled to do the work or not, he is entitled to recover the expense under s. 11. That section provides that "All reasonable costs and expenses incurred in . . . . obtaining a nuisance order, or in carrying the order into effect, shall be deemed to be money paid for the use and at the request of the person on whom the order is made; . . . . or if no order is made, but the nuisance is proved to have existed when the notice was served . . . . then of the person by whose act default or sufferance the nuisance was caused." I understand the words "expenses incurred . . . . in carrying the order into effect" to include, as was held in *Gebhardt* v. *Saunders* (1), the expenses of the execution of work in obedience to an abatement notice. So that the effect of the section seems to be that where an abatement notice is served, and in consequence of the party served doing the work in obedience thereto no nuisance order is made, the expense incurred in doing the work is to be deemed to be money paid at the request of the person by whose default the nuisance was caused. The expenses, therefore, incurred by the plaintiff in this case are by virtue of that section to be deemed to have been incurred at the request of the defendants. I think the county court judge was wrong, and that the appeal must be allowed.

MATHEW J. concurred.

*Appeal allowed.*

Solicitors for plaintiff: *Andrew Wood & Purves.*
Solicitor for defendants: *G. L. Hawker.*

(1) [1892] 2 Q. B. 452.

J. F. C.

## BLENKINSOP *v.* OGDEN.

1898
*April* 23.

*Factory Acts—Neglect to Fence Machinery— Compensation to Injured Person Contributory Negligence—Factory and Workshop Act*, 1878 (41 & 42 *Vict.* c. 16), s. 82.

By s. 82 of the Factory and Workshop Act, 1878, "If any person is killed or suffers any bodily injury in consequence of the occupier of a factory having neglected to fence any machinery . . . . the occupier of the factory or workshop shall be liable to a fine not exceeding 100*l*., the whole or any part of which may be applied for the benefit of the injured person or his family or otherwise as a Secretary of State determines":—

*Held*, that, where a person has been injured by the occupier's neglect to fence, the fact that the injury was proximately caused by such contributory negligence on the part of the injured person as would have debarred him from maintaining a civil action is no answer to a complaint under the above section.

CASE stated by a metropolitan police magistrate.

The respondents are printers, and as such are the occupiers of a factory or workshop within the meaning of the Factory and Workshop Acts, 1878 to 1895. On September 21, 1897, a boy named Wright, being then in their employment, while working at a printing machine on their premises, caught his hand in the wheels of the machine and was injured. It was the duty of Wright, and he was so directed by one Skinner, the machine-minder under whose orders he was working, to stand on a stool at the side of the machine to keep the paper straight, but the accident happened while he was standing at the back of the machine, contrary to the directions so given to him by Skinner. The back gear of the machine, where the boy's hand was caught in the wheels, was a dangerous part of the machinery within the meaning of the said Acts, and was not sufficiently fenced. If the boy had stood upon the stool by the side of the machine as directed, the accident would not have happened. On the hearing of a complaint preferred under s. 82 (1) of the Factory and Workshop Act, 1878, by the appellant,

(1) By s. 5 of the Factory and Workshop Act, 1878 (as amended by 54 & 55 Vict. c. 75, s. 6), all dangerous parts of the machinery are to be securely fenced, and a factory in which there is a contravention of

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one of Her Majesty's inspectors of factories and workshops, the magistrate found the facts as above stated; but, being of opinion that the accident was caused by the boy's own carelessness and disobedience to orders, he dismissed the complaint, subject to a case for the opinion of the Court.

*H. Sutton*, for the appellant. Where dangerous machinery is left unfenced, the occupier of the factory is liable to a penalty of 10*l.* under s. 81, even though no injury results. But the Legislature, considering that where injury results the offence is more serious, impose in that case the heavier penalty of 100*l.* The injury arising from unfenced machinery is not the less "in consequence of" the neglect to fence because the injured party contributed to it by his negligence. The section is a penal section directed against the occupier, and not intended to provide a summary procedure for the recovery of compensation by the injured person. No part of the fine is to go to him unless the Secretary of State so determines. The provisions of the section have been extended to injury in consequence of breaches of certain requirements other than that of fencing by s. 13 of the Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), which latter section concludes with the proviso "that in case of injury to health the occupier shall not be liable under this section unless the injury was caused directly by such neglect." Those words point to the conclusion that, except in that case, an injury may be treated as "in consequence of" the neglect, although not directly caused by it.

*Ruegg*, *Q.C.*, and *Forman*, for the respondents. The words "in consequence of" mean "caused by," and the magistrate

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that section is to be deemed not to be kept in conformity with the Act.

By s. 81, "If a factory or workshop is not kept in conformity with this Act, the occupier thereof shall be liable to a fine not exceeding ten pounds."

By s. 82, "If any person is killed or suffers any bodily injury in consequence of the occupier of a factory having neglected to fence any machinery required by or in pursuance of this Act to be securely fenced . . . . the occupier of the factory or workshop shall be liable to a fine not exceeding one hundred pounds, the whole or any part of which may be applied for the benefit of the injured person or his family or otherwise as a Secretary of State determines."

has found that the injury was caused by the boy's own carelessness and not by the neglect of the respondents. It is admitted that the boy's conduct would preclude him from recovering in an action for damages. It must equally prevent the infliction of a penalty under s. 82. For the reason why he could not recover in an action is that his contributory negligence would destroy the causal connection between the respondents' neglect and the injury sustained. If the appellant's contention is right, the owner of an unfenced machine would be liable under s. 82, even though the workman saw it was unfenced and wilfully put his hand into the gearing with the intention of injuring himself.

GRANTHAM J. I have no doubt that in this case the magistrate ought to have inflicted a fine under s. 82. It was contended for the respondents that that section cannot apply where the injury was directly caused by the negligence of the injured person. But I cannot accept that construction of the statute. In my view, where the injury which results would not have happened but for the unfenced condition of the machinery, the fact that the injured person has also been negligent does not prevent the non-fencing of the machinery from being that in consequence of which the injury happened. The injured person is not entitled as of right to any part of the penalty inflicted under the section. It is entirely in the discretion of the Secretary of State to say what shall be done with it, and whether any and what part of it shall be given to the injured person as compensation.

KENNEDY J. I am of the same opinion. It being admitted that, but for the neglect to provide proper fencing, the injury would not have been suffered, I think it would be clearly wrong, looking at the object of the section, to construe the words "in consequence of" as if we were dealing with an action by the injured person for damages. In that case his own contributory negligence would be an answer, upon the ground that the immediate and direct cause of the mischief would be his own conduct, and not the occupier's neglect to fence. But here we

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are dealing with a section the primary object of which is not to compensate the injured person, but to provide safe machinery. It is to the interest of the State that the machinery should be safe for negligent as well as for careful people, and it is reasonable that the State should impose a penalty upon the party omitting to fence even under circumstances under which the person injured by the omission could not recover damages. I am not alarmed by the suggestion made by Mr. Ruegg as to the possibility of a workman taking advantage of the unfenced condition of the machinery to inflict upon himself an intentional injury with a view of getting compensation. I should think it would be very difficult for him in such a case to persuade the Secretary of State that he was injured in consequence of the employer's neglect.

So far as one may look at one section as throwing light upon the meaning of another, s. 13 of the Act of 1895, to which our attention has been called, seems to suggest that in the opinion of the Legislature the construction which we have placed upon the section before us is the true one.

*Appeal allowed.*

Solicitor for appellant: *Solicitor to the Treasury.*
Solicitor for respondents: *B. Webb.*

J. F. C.

[IN THE COURT OF APPEAL.]

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*March* 12, 29.

## *In re* GOETZ, JONAS & CO. *Ex parte* THE TRUSTEE.

*Bankruptcy—Reputed Ownership—Assignment of Debt—Bill of Exchange—Custom of Trade—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52).

Bankrupts had, prior to their bankruptcy, sold and consigned goods to customers in Spain on the terms that the customers were to have six months' credit from the date of the invoice, and on the expiration of the first three months, but not before, were bound to accept the bankrupts' drafts at three months for the price of the goods. The bankrupts, on making the consignments, obtained advances from bankers upon the following terms, namely, that they should draw for the price of the goods upon their customers in Spain at six months from the date of the invoice, and hand the draft to the bankers, and, when the period of three months from the date of the invoice arrived, they should draw a bill of exchange upon the customer for the price of the goods, and hand the bill to the bankers for them to get it accepted by the customer, and, when the bill was met, the unaccepted draft at six months should be handed back to the bankrupts. The bankrupts, in pursuance of this arrangement, drew and handed to the bankers drafts for the prices of goods sold and consigned to customers in Spain at six months from the date of the invoice, and at the commencement of the bankruptcy these drafts were in the hands of the bankers unaccepted and no notice of the transaction between them and the bankrupts had been given to the customers:—

*Held*, that the debts owing by the Spanish customers to the bankrupts were at the commencement of the bankruptcy in the order and disposition of the bankrupts, in their trade, by the consent and permission of the true owners under such circumstances that the bankrupts were the reputed owners thereof.

A custom of trade by which goods are left in the possession of persons to whom they do not belong must, in order to exclude the doctrine of reputed ownership, be a custom known in business generally, and not merely to persons dealing in a particular market.

APPEAL from the order of a Divisional Court (Wright and Bruce JJ.) reversing an order of the judge of the Lancashire County Court sitting in bankruptcy.

The question raised in the county court was whether certain debts to the amount of 1936*l.* due to the bankrupts, Messrs. Goetz, Jonas & Co., in respect of the prices of goods sold and consigned by them to customers in Spain as after mentioned,

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which debts had been made security for advances to the bankrupts by Messrs. Armstrong & Co., who were bankers in London, in the manner hereinafter described, belonged to the trustee in bankruptcy as having been at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupts, in their trade or business, by the consent and permission of the true owners, under such circumstances that the bankrupts were the reputed owners thereof.

Messrs. Goetz, Jonas & Co., who then carried on the business of general shippers at Manchester, had previously to their bankruptcy sold and consigned goods to various customers in Spain. It appeared that the course of business in relation to such sales and consignments was that the Spanish customer had six months' credit from the date of the invoice, and for the first three months from that date was under no obligation to accept any draft for the price of the goods purchased, though he might, if he pleased, remit in cash during that period. Upon the expiration of the first three months from the date of the invoice the customer was bound to accept drafts at three months for the price of the goods. Upon making these consignments the bankrupts procured advances from Messrs. Armstrong & Co. upon the following terms: the bankrupts drew a draft for the price of the goods upon their Spanish customer at six months from the date of the invoice, and handed it to Messrs. Armstrong & Co. together with a copy invoice and duplicate bill of lading: upon receipt of this draft Messrs. Armstrong & Co. gave to the bankrupts their acceptance at three months for something less than the invoice price, which the bankrupts were at liberty to discount: when the period of three months from the date of the invoice arrived, the bankrupts drew a bill at three months upon their Spanish customer for the price of the goods sold and consigned to him, and handed it to Messrs. Armstrong & Co. for them to get it accepted by the Spanish customer, who returned it accepted to them, and, when it was met, Messrs. Armstrong & Co. returned the unaccepted draft at six months to the bankrupts.

The adjudication of bankruptcy took place on May 13, 1896, upon the bankrupts' own petition, they having on the 7th of

that month called their creditors together. At the commencement of the bankruptcy Messrs. Armstrong & Co. held various six months' drafts, which had been given to them by the bankrupts in relation to transactions such as above described, unaccepted and unpresented to the Spanish customers, together with the copy invoices and duplicate, but not the original bills of lading. In the case of all these drafts but two, which were drawn respectively on January 31 and February 1, 1896, the period of three months from the date of the invoice had not expired at the commencement of the bankruptcy. No notice had prior to the bankruptcy been given to the Spanish customers of the giving of the six months' drafts to Messrs. Armstrong & Co. or of any part of the transactions between them and the bankrupts. Subsequently to the bankruptcy the six months' drafts were presented to the customers for acceptance, and some were accepted and others not. There was evidence to the effect that it was the regular course of business in the Spanish trade for six months' drafts, such as those given by the bankrupts as before mentioned, to be drawn and negotiated with persons in England and replaced at the end of three months by three months' bills, and that they were treated as negotiable at all times during their currency. The county court judge held that the debts in question were at the commencement of the bankruptcy in the order and disposition of the bankrupts with the consent of Messrs. Armstrong & Co., the true owners, under such circumstances that the bankrupts were the reputed owners thereof, and gave judgment in favour of the trustee accordingly.

On appeal the Divisional Court reversed his decision.

March 12. *E. Sutton*, and *F. Mote*, for the trustee. These debts were at the commencement of the bankruptcy in the order and disposition of the bankrupts with the consent of the true owners under such circumstances that the bankrupts were the reputed owners thereof. Absence of notice to the debtor of an assignment of a debt by the bankrupt is in general conclusive evidence that the debt remained in the reputed ownership of the bankrupt with the consent of the true owner: *Ex*

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*parte Monro* (1); *Ryall* v. *Rowles* (2); *Rutter* v. *Everett* (3); Williams on Bankruptcy, 5th ed. p. 196; Lindley on Partnership, 6th ed. p. 696. It is true that there is an exception in the case of bills of exchange, and other negotiable instruments, in the case of which no notice is required to take them out of the reputed ownership of the bankrupt, because they are transferable by indorsement and delivery without notice to the parties liable: *Belcher* v. *Campbell.* (4) But this case does not come within that exception, which applies to the case of a negotiable instrument valid as against the debtor. The six months' bills were not accepted and had not been presented for acceptance, and, indeed, the debtors were not bound to accept them. The giving of these documents unknown to the debtors and which did not bind them could not take the debts out of the reputed ownership of the bankrupts.

*Lawson Walton, Q.C.*, and *Muir Mackenzie*, for the respondents. In order to bring a case within the reputed ownership clause, the matters in question must have been left in the order and disposition of the bankrupt, by the consent and permission of the true owner, and also under such circumstances as to give rise to a reputation of ownership by the bankrupt: *Colonial Bank* v. *Whinney.* (5) Neither of those elements exist in the present case. If the true owner has done all that he can by way of perfecting his title and taking the goods out of the disposition of the bankrupt, it is not by his consent that they remain in the bankrupt's disposition: *Belcher* v. *Bellamy* (6); and it is a question of fact in each case whether the reputation of ownership by the bankrupt exists under the circumstances. If the absence of notice of an assignment does not give rise to a reputation of ownership by the bankrupt, the section does not apply. If there is a well-known custom of trade that goods should be left in the possession of persons to whom they do not belong, that will exclude the doctrine of reputed ownership: *Ex parte Watkins.* (7)

(1) (1819) Buck, 300.
(2) (1749–50) 1 Ves. Sen. 348.
(3) [1895] 2 Ch. 872.
(4) (1845) 8 Q. B. 1.
(5) (1886) 11 App. Cas. 426.
(6) (1848) 2 Ex. 303.
(7) (1873) L. R. 8 Ch. 520.

In the present case the respondents could not have presented the bills to the Spanish customers for acceptance, because the three months from the date of the invoice had not expired; and, it being the well-known practice in the Spanish trade that, three months' open credit being given, drafts at six months from date of invoice should, as in the present case, be drawn and negotiated as between the shippers and parties in England, no reputation of ownership of the debt by the bankrupts arose under the circumstances of this case. In the case of bills of exchange no notice to the debtor is necessary to take them out of the reputed ownership section, they being negotiable instruments. *Ex parte Barnett* (1) shews that in the case of a debt secured by a negotiable instrument no notice of assignment is required to exclude the doctrine of reputed ownership: see also *Ex parte Price* (2); *Ex parte Kemp.* (3)

*E. Sutton*, in reply. The cases in which a custom to leave goods in the possession of persons to whom they do not belong was held to exclude the reputation of ownership by a bankrupt were cases of a custom known to the whole world, as in the case of wine merchants, and not of a custom only known to persons dealing in a particular market. The custom suggested in the present case would not be known to the different manufacturers who supplied the bankrupts with goods. In *Ex parte Price* (2) the bill of exchange was accepted. *Ex parte Kemp* (3) did not depend on any doctrine with regard to bills of exchange. In that case the bills of lading were annexed to the drafts, so that there was really constructive possession of the goods. The respondents did not do all they could before the bankruptcy to take the debts out of the bankrupts' order and disposition, for they might have given notice that they held the six months' drafts to the Spanish customers.

*Cur. adv. vult.*

March 29. A. L. SMITH L.J. read the following judgment:—Upon May 13, 1896, Messrs. Goetz, Jonas & Co., who then carried on the business of general shippers at Manchester,

(1) (1845) De G. 194. (2) (1844) 3 M. D. & D. 586.
(3) (1874) L. R. 9 Ch. 383.

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were adjudicated bankrupts upon their own petition, they having called their creditors together upon the 7th of that month. At this date certain Spanish customers to whom Messrs. Goetz, Jonas & Co. had sold and consigned goods were indebted to them in sums amounting in all to 1936*l.*, which sums were payable to Goetz, Jonas & Co. at different dates, according to the times at which the respective credits expired. The question is whether these debts were upon May 7, 1896, in the order and disposition of the bankrupts with the consent of the true owners thereof within the meaning of s. 44, sub-s. 2 (iii.), of the Bankruptcy Act, 1883, so as to be divisible amongst the creditors of the bankrupts, or whether they belonged to Messrs. Armstrong & Co., bankers in London, who had financed the bankrupts as hereinafter mentioned.

The course of business between Messrs. Goetz, Jonas & Co. and their Spanish customers, as appears from the evidence, was this. Messrs. Goetz, Jonas & Co. purchased goods from the manufacturers in England and then sold and consigned them to, amongst others, customers in Spain. The terms of credit were as follows: The Spanish customers had six months' credit from the date of invoice, and for the first three months from that date were under no obligation to accept any draft for the goods purchased. They had what has been called an open credit for these first three months, though if they liked they might remit in cash during that period. It is said that they sometimes did so. Why, I do not understand, nor has the learned counsel been able to explain why they should do so, but it appears to have been done on some occasions. Upon the expiration of the first three months from the date of invoice the customers were bound to come under acceptance for the price of the goods purchased and to accept the draft of Messrs. Goetz, Jonas & Co. upon them at three months. Contemporaneously with this course of business between Goetz, Jonas & Co. and their Spanish customers, the former sought financial aid from Messrs. Armstrong & Co., who are bankers in London, the terms agreed upon between them being as follows: Messrs. Goetz, Jonas & Co. drew a draft upon their Spanish customer at six months from date of invoice, and then handed this draft to

Messrs. Armstrong & Co., together with a copy invoice and duplicate bill of lading. Upon receipt of this draft at six months Messrs. Armstrong & Co. handed to Messrs. Goetz, Jonas & Co. their acceptance at three months for something less than the invoice price, which draft Messrs. Goetz, Jonas & Co. were at liberty to discount and thus place themselves in funds. When three months from the date of invoice arrived, Messrs. Goetz, Jonas & Co. then drew a bill at three months upon their Spanish customer for the value of the goods sold and consigned to him, and handed it to Messrs. Armstrong & Co. for them to get it accepted by the Spanish customer, who returned it accepted to them, and when met, Messrs. Armstrong & Co. handed back the unaccepted draft at six months to Messrs. Goetz, Jonas & Co., its function having then been exhausted. It will be seen that during the first three months, whilst the six months' draft was running, Messrs. Armstrong & Co. could not call upon the Spanish customer to accept this six months' draft, nor any other bill, and this six months' draft was but a security to the bankers for the due performance by Messrs. Goetz, Jonas & Co. of their engagement with them—that is, at the termination of the first three months to draw at three months upon their Spanish customer and hand the bill so drawn to them (the bankers) in order that they might get it accepted by the Spanish customer and at maturity obtain the proceeds thereof. At the date of the bankruptcy the position of Messrs. Armstrong & Co. was this. Their acceptances which they had given to Messrs. Goetz, Jonas & Co. had been discounted by them, and Messrs. Armstrong & Co. were either under cash advances or were liable upon their acceptances. They held the six months' drafts of Messrs. Goetz, Jonas & Co. unaccepted by and unpresented to the Spanish customers, copy invoices, and duplicate, but not the original, bills of lading.

In these circumstances the question arises, were the debts owing by the Spanish customers to Goetz, Jonas & Co. at the date of the bankruptcy in the order and disposition of the bankrupts? That they were "debts due or growing due to the bankrupts in the course of their trade or business" is clear. For these debts the Spanish customers had accepted

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no bills, and unquestionably they were debts for which Messrs. Goetz, Jonas & Co. could give the Spanish customers valid discharges, and I do not doubt that they were in the order and disposition of the bankrupts at the date of the bankruptcy.

But it is said that, although this might be so, they were not debts in the order or disposition of the bankrupts in their trade and business by the consent and permission of the true owners under such circumstances that they (the bankrupts) were the reputed owners thereof. It is not suggested that the bankers gave notice to the debtors of the assignment of the debts to them by means of the six months' drafts handed as they were by Messrs. Goetz, Jonas & Co. to them, but it is said that this was not necessary, because these six months' drafts were negotiable instruments and consequently no notice of the assignment need be given. It is not disputed that absence of notice to a debtor by the assignee of a debt leaves a debt within the order and disposition and reputed ownership section of the Bankruptcy Act; but it is said that, if the assignment of the debt be by a bill of exchange, it is otherwise because of the negotiability of the instrument. If the six months' drafts had been accepted before bankruptcy by the Spanish debtors for their debts owing to the bankrupts, this would be so, and, as it appears to me, the reason why notice of such an assignment is not required is that by accepting the bills the debtor has notice of the assignment, and what is more, if more be necessary, he has agreed to pay the debt not to the original creditor, but to the assignee—that is, to the holder of the bill. Cases have been cited as to bills accepted by the debtor constituting an assignment of a debt, so as to take the case out of the order and disposition section; but none have been cited to shew that an unaccepted draft without notice to the debtor completes an assignment so as to take the debt of such debtor out of the order and disposition of the bankrupt. Assignment coupled with notice to the debtor is equivalent to taking possession of the debt by an assignee, and thus takes the debt out of the reputed ownership section; but there has been no notice to the debtors in the present case.

It was further argued for the bankers that the debts owing by the Spanish customers were not within the reputed ownership section, because reputation of ownership may be excluded by a well-known custom of trade, such, for instance, as in a wine merchant's trade, whereby it is well known to all that wine the property of another is constantly left with the wine merchant, so that a bankrupt wine merchant in such a case is not the reputed owner of the wine left in his possession: *Ex parte Watkins.* (1) There are many cases based upon notorious customs applicable to other trades. It is argued that the reputation of ownership by the bankrupts of the debts in question was excluded by a custom in the Spanish trade. The analogy is certainly ingenious, if not far-fetched, but I think Mr. Sutton for the trustee pointed out one fallacy lurking in the suggestion which is a sufficient answer to this point. In the case put the custom is notorious to all the world, whereas in the present case the custom spoken to by the witnesses is known only to those who deal in a particular market, and it appears to me that such a limited custom cannot affect persons who know nothing of the custom, and do not deal in the particular market. There is no evidence that the manufacturers, who sold their goods to the bankrupts and who through the trustee in bankruptcy are now seeking to get the 1936*l.* in question to part pay them for their goods sold to the bankrupts, knew to what part of the world or to what markets the bankrupts were about to consign the goods, or that they were going to Spain, or that they knew anything whatever of the particular custom. The usual course of retaining the bills of lading until the drafts of the sellers are accepted by the purchasers has not been followed in this case by the bankers. If this had been done all would have gone well; but, as it was not, these debts were in the order and disposition of the bankrupts upon May 7, 1896, and in my opinion the trustee's title is superior to that of the bankers, and the learned county court judge was right when he so held, and this appeal from the Queen's Bench Division must therefore be allowed.

(1) L. R. 8 Ch. 520.

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CHITTY L.J. read the following judgment:—The debts in question were debts due or growing due to the bankrupts in the course of their trade. In my opinion they were at the commencement of the bankruptcy in their order and disposition in their trade by the consent and permission of Messrs. Armstrong & Co., the true owners of the debts, under such circumstances that the bankrupts were the reputed owners thereof, and consequently the debts passed to the trustee in bankruptcy, and were divisible among the general creditors. According to the course of business between the bankrupts and their Spanish customers, the latter were entitled to a six months' credit from the date of the invoice for the price of the goods bought by them from the bankrupts. The Spanish customers seem, however, to have been at liberty to pay at any time before the expiration of the credit. At the end of the first three months, but not before, the Spanish customers came under an obligation to accept the bankrupts' drafts on them for the price. The first three months' period has conveniently and appropriately been termed a period of open credit. The bankrupts, who carried on business at Manchester, being in want of funds, applied to Messrs. Armstrong & Co., bankers in London, for assistance, and obtained it on the security of the debts owing by the Spanish customers. The debts in question were, at the commencement of the bankruptcy, debts owing by the Spanish customers for which they had not given nor been asked to give their acceptances. No notice had been given to the Spanish customers of the equitable title of Messrs. Armstrong & Co. to the debts. The case thus far is simple and clear. But reliance is placed by Messrs. Armstrong & Co. on the arrangements which had been come to between them and the bankrupts. The short effect of these arrangements was as follows. The bankrupts had drawn six months' bills on the Spanish customers and had deposited them with Messrs. Armstrong & Co. as security for bills for lesser amounts, which Messrs. Armstrong & Co. had accepted, to enable the bankrupts to raise money on them in their own locality, which they had done. These six months' bills were in the hands of Messrs. Armstrong & Co. at the commencement of the bankruptcy. I understand that they

had not negotiated any of them; it is immaterial whether they had or had not. These six months' bills were equal in amount to the debts in question. None of these bills had been presented to the Spanish customers for acceptance before the commencement of the bankruptcy; apparently it was not intended they should be. The bankrupts had solemnly undertaken to hand to Messrs. Armstrong & Co. any remittances which might come to their hands from their Spanish customers. As to the greater part of these six months' bills the three months' open credit had not expired; as to some it had. But I see no difference between the bills in this respect.

Now, the argument founded on these facts was that the debts were represented by these six months' unaccepted bills of which the Spanish customers had no notice; and it was contended that the debts, being represented by these bills, passed at law by the bills to the holders of them. The argument is involved and difficult to follow. The answer to it is simple and easy. The debts owing by the Spanish customers had not passed into these bills, nor were the Spanish debts represented by them. The drawee of a bill who does not accept is not liable on the instrument, and such a bill of itself does not operate as an assignment of funds in the hands of the drawee available for payment: see the 53rd section of the Bills of Exchange Act, 1882. An agreement to accept a bill does not run with the draft so as to pass any right of action to the holder for the time being. The bills were good bills as between the parties to them, but this does not affect the question. The six months' bills were sent out to Spain for acceptance after the adjudication; most of them were accepted, but it was then too late. The result is that these Spanish debts were still owing on the open credit.

Messrs. Armstrong & Co.'s counsel then argued that the debts were not in the order or disposition of the bankrupts under such circumstances that they were the reputed owners thereof. They relied on the authority of such cases as those relating to wine merchants and others where there is a general and notorious custom in the bankrupt's trade that he should have

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in his possession goods belonging to some other person. The custom relied on in this case has already been sufficiently described by the Lord Justice. It was a custom or practice, such as it was, confined to the limited area of persons engaged in Spanish trade; it was not a notorious custom well known among traders in general. It is not shewn that it was known in Manchester, or by the manufacturers or merchants who supplied the bankrupts with the goods which they afterwards exported to Spain. A custom not to give notice to the debtor of an assignment would, in my opinion, be bad, and it would not avail to take a case out of the 44th section.

For these reasons I think that the order of the county court judge was right, and that the appeal ought to be allowed.

COLLINS L.J. concurred.

*Appeal allowed.*

Solicitor for appellant: *Richard Page.*

Solicitors for respondents: *Henry Clarkson & Son.*

E. L.

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C. A. 1898 *April* 5.

[IN THE COURT OF APPEAL.]

## PENDER AND OTHERS *v.* TADDEI.

*Practice—Counter-claim—Cause of Action against Plaintiff by Defendant jointly with another Person—Joinder of Parties—Order* XVI., *r.* 11—*Order* XXI., *r.* 11.

The defendant in an action counter-claimed in respect of a cause of action which he claimed to have jointly with another person against the plaintiffs, joining that other person with the plaintiffs as a co-defendant to the counter-claim:—

*Held*, that the rules did not admit of such a counter-claim, and therefore it must be struck out.

APPEAL against the order of a judge at chambers, affirming the decision of a master, striking out the defendant's counter-claim.

The action was by the plaintiffs, as executors, against the

defendant as acceptor of two bills of exchange for 5000*l.*, each drawn by the plaintiffs' testator on behalf of himself and one Balfour, and indorsed to the plaintiffs' testator.

The defendant delivered a defence, and a counter-claim claiming damages for breach of a contract for the purchase of certain property in Italy from the defendant and one Bellani as joint vendors by the plaintiffs' testator and Balfour.

The counter-claim was headed as being between the defendant in the action as plaintiff and the plaintiffs in the action and Bellani as defendants. The allegations therein contained, so far as material, were in substance that a contract was made by which the defendant and Bellani jointly agreed to sell to the plaintiffs' testator and Balfour and they agreed to purchase the property in question for the sum of 100,000*l.*, of which 50,000*l.* was to be paid on the completion of the purchase and delivery of possession and of a proper conveyance of the property, less any money not exceeding 10,000*l.* which the plaintiffs' testator and Balfour or either of them should previously have advanced to the defendant together with any interest which might have accrued thereon, and the further sum of 50,000*l.* at a subsequent date as in the contract provided; that the defendant received from the plaintiffs' testator and Balfour the sum of 10,000*l.* by way of advance as provided by the contract, and the bills sued on were given as security for the same; and that the vendors were always able, ready, and willing to carry out the contract, but the plaintiffs' testator and Balfour were unable and failed and refused to perform the same and to complete and pay for the property; and the defendant claimed 70,000*l.* as against the plaintiffs in the action as executors of their testator, and as against all the defendants to the counter-claim a declaration that so much of that sum as was necessary to meet any claim which the plaintiffs in the action might have against the defendant might be set off against it; and that the residue of such sum might be dealt with by the Court and paid as to the Court should appear just.

The plaintiffs applied to strike out the counter-claim, and the master granted the application. On appeal the judge at chambers affirmed his order.

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*C. C. Scott*, for the defendant. No provision is made by the Judicature Act or rules for joining as a co-plaintiff in a counter-claim a person having a joint cause of action with the defendant against the plaintiff. But it is manifestly unjust that, where, as in the present case, the counter-claim sought to be pleaded arises out of the same transaction as the claim, the plaintiff should be entitled to recover the full amount on his claim, and the defendant should not be allowed to counter-claim in respect of a claim due from the plaintiff to him jointly with another person. It is submitted that the old Chancery practice applies by which a person entitled to sue jointly with the plaintiff may, if he declines to sue, be joined as a defendant. It is provided by Order XVI., r. 11, that "no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." It is submitted that the general intention of the Judicature Act and rules is that, where it can be done without inconvenience, all matters in controversy between the parties to an action should be determined in the same litigation, and the unnecessary expense of cross-actions be avoided, especially where the matters arise out of the same transaction. There is nothing in the present case to prevent this being done. [He referred to Order XXI., r. 11, and *Luke* v. *South Kensington Hotel Co.* (1); *Turner* v. *Hednesford Gas Co.* (2)]

*G. Spencer Bower*, for the plaintiffs, was not called upon.

A. L. SMITH L.J. In this case the plaintiffs sue the defendant on his acceptances, and the defendant sets up a counter-claim against the plaintiffs and joins one Bellani as a defendant to the counter-claim. Bellani was a joint contractor with the defendant for the sale of land to the plaintiffs' testator, and the defendant alleges that he and Bellani have a claim against the plaintiffs' testator for not carrying out the contract for the purchase of the land. The defendant does not make Bellani a co-plaintiff with himself in the counter-claim, but makes him a co-defendant with the plaintiffs. The question is

(1) (1879) 11 Ch. D. 121.

(2) (1878) 3 Ex. D. 145.

whether the defendant can do this. I am clearly of opinion that he cannot. Order XXI., r. 11, provides that, "where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title similar to the title in a statement of claim, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver his statement of defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff." It is clear that the defendant is not really raising any question between himself and the plaintiffs along with any other persons; he is raising a question between himself along with another person and the plaintiffs. He seeks to put Bellani in the position of defendant when he ought to be in the position of co-plaintiff with himself in the counter-claim. I do not think the defendant can do indirectly what the rules do not appear to enable him to do directly. In my opinion what we are deciding does not conflict with anything that was said by Bramwell L.J. in *Turner* v. *Hednesford Gas Co.* (1) For these reasons I think the order of the learned judge was right and should be affirmed.

CHITTY L.J. I am of the same opinion. I do not hesitate to say that I think that Order XXI., r. 11, must be read in the way the Lord Justice has read it. The words of the rule can only be construed as referring to cases where the defendant raises by counter-claim questions between himself and the plaintiff along with other persons, and not as including a case where the defendant raises questions between himself along with other persons and the plaintiff. The rule only applies where the defendant could have brought a cross-action against the plaintiff and the other persons. If the rules do not give the defendant power to counter-claim jointly with another person against the plaintiff directly, then, counter-claim being entirely the creature of the Judicature Act, I do not think he can be allowed to do the same thing indirectly in the manner

(1) 3 Ex. D. 145.

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proposed. The defendant's counsel relied upon the old Chancery practice, but it does not appear to me to be applicable to a case like the present.

COLLINS L.J. concurred.

*Appeal dismissed.*

Solicitors for plaintiffs: *Barlow & Barlow.*
Solicitors for defendant: *Hogan & Hughes.*

E. L.

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1898 *April* 26, 27.

## THE QUEEN *v.* COTHAM AND ANOTHER, JUSTICES, AND WALLACE AND WEBB.

*Mandamus—Licensing Acts—Justices—Hearing and Determination according to Law—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 4.

By 9 Geo. 4, c. 61, s. 4, licensing justices at special transfer sessions have power to license persons, "intending to keep inns theretofore kept by other persons being about to remove from such inns," to sell exciseable liquors by retail. Justices, acting under that section, granted a licence by way of transfer from a person who was not and had not been in occupation of the premises in respect of which he held it, and no exciseable liquors had been sold upon those premises for many years:—

*Held*, that as the justices had disregarded the provisions of the statute giving them jurisdiction, and must have acted upon some considerations altogether outside that statute, they had not heard and determined the matter according to law, and that a mandamus ought to go commanding them so to hear and determine it.

THESE were three rules obtained on behalf of the Reverend J. W. Williams. The first was for a certiorari to bring up and quash an order made by justices of the county of Lancaster, at the general annual licensing meeting held in and for the Prescot Division of the same county, in August, 1897, by which order the defendant justices granted, by way of renewal, to Joseph Wallace a certificate or licence authorizing him to apply for and hold an excise licence to sell by retail at a house situate at Church Street, Farnworth Widnes, in the same county, beer to be consumed either on or off the premises,

pursuant to the statutes in that behalf. The ground stated in this rule was that Joseph Wallace was not the real resident holder or occupier of the premises in question.

The second rule was for a certiorari to bring up and quash an order made by the same justices at special transfer sessions held in and for the Prescot Division in December, 1897, whereby they granted, by way of transfer from Joseph Wallace to John Webb, a similar certificate or licence. The grounds stated in this rule were—(1.) that no valid licence was in existence, and therefore no transfer was possible; (2.) that the application did not come within s. 14 of 9 Geo. 4, c. 61.

The third rule was for a mandamus to the justices commanding them to hold within a reasonable time a special session for licensing purposes for the Division of Prescot, and to proceed to hear and determine, pursuant to the statutes in that behalf, the matter of Joseph Wallace's application for a grant by way of transfer from him to John Webb of the same certificate or licence.

The following facts appeared from the affidavits filed in support of the rules: For some years prior to August, 1897, Wallace had held a justices' licence or certificate authorizing him to apply for and hold an excise licence to sell beer to be consumed on and off the premises in question, and in August, 1897, he obtained a renewal of such licence or certificate at the general annual licensing sessions. In December, 1897, he applied at special transfer sessions for a grant, by way of transfer, to John Webb of the same licence or certificate. This application was opposed by the Reverend J. W. Williams, vicar of the parish of Farnworth Widnes, and other inhabitants of the parish. For about thirteen years prior to the application for a transfer no beer, cider, or other intoxicating liquors had been sold upon the premises, and Wallace had not resided in or occupied them for a period of upwards of ten years. They had for many years past been used only as a draper's shop, and as the residence of the draper and his family. These facts were proved or admitted before the justices when the application for a transfer was made.

The justices granted the application for a transfer, their order

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stating that the transfer was granted pursuant to s. 4 of 9 Geo. 4, c. 61 (1), and the Acts amending the same.

These rules were afterwards obtained.

*Mattinson, Q.C.* (*T. Swift* with him), shewed cause against the rules. The remedy by certiorari does not apply in respect of orders made by licensing justices: *Reg.* v. *Sharman, Ex parte Denton.* (2) As to the rule for a mandamus, the justices have heard and determined the matter of Wallace's application for a transfer. Conceding that Wallace was not an applicant to whom s. 4 of 9 Geo. 4, c. 61, could apply, still his application was heard, and the evidence on affidavit only shews that the justices came to a wrong conclusion. Under such circumstances the remedy by mandamus is not applicable. The applicant has no legal specific interest in the matter determined by the justices, and therefore is not entitled to apply for a mandamus: *Reg.* v. *Lewisham Union.* (3) His only interest is that he resides in the place.

[*Per Curiam.* He clearly has sufficient interest.]

*H. Avory* (*R. M. Montgomery* with him). As to certiorari, it must be admitted that this Court is bound by the decision of the Divisional Court in *Reg.* v. *Sharman, Ex parte Denton.* (2) The applicant, however, is entitled to a mandamus. The

(1) 9 Geo. 4, c. 61, s. 4: "The justices assembled at the general annual licensing meeting in every year shall appoint . . . . special sessions . . . . at which . . . . it shall be lawful for the justices then and there assembled, in the cases and in the manner and for the time hereinafter directed, to license such persons to keep inns theretofore kept by other persons being about to remove from such inns, as they the said justices shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper persons, under the provisions hereinafter enacted, to be licensed to sell exciseable liquors by retail to be drunk or consumed on the premises."

[By the Wine and Beerhouse Act, 1870 (33 & 34 Vict. c. 29), s. 4, sub-s. 5, all the provisions of 9 Geo. 4, c. 61, and the Acts amending the same, relating to the transfer, removal, and transmission of licences, and the grant of licences upon change of occupancy, are to have effect with regard to the certificates of justices which, under the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), are necessary in order to obtain an excise licence to sell beer by retail. Such certificates are, by other statutes, made necessary in respect of the sale of beer off the premises.]

(2) Ante, p. 578.

(3) [1897] 1 Q. B. 498.

justices clearly have not heard and determined according to law. Upon the facts before them they had no jurisdiction to grant a transfer under s. 4 of 9 Geo. 4, c. 61, and they must have acted upon considerations outside the provisions of the statute. Where that is shewn a writ of mandamus is the proper remedy: *Reg.* v. *Justices of London.* (1)

[KENNEDY J. referred to *Reg.* v. *De Rutzen* (2) as supporting the proposition that a mandamus is the proper remedy where there has not been a hearing and determination according to law.]

The same principle was affirmed in *Reg.* v. *King* (3), and recently in *Reg.* v. *Bowman.* (4)

WILLS J. One part of this case is perfectly free from doubt; the other is not quite so clear. It is perfectly clear that the justices' decision is absolutely unsupported by any Act of Parliament or by any power vested in them. There was an application to them for the transfer of a certificate necessary, under the Wine and Beerhouse Act, 1869, to enable the holder to get an excise licence. For all purposes of procedure and machinery the application is put, by sub-s. 5 of s. 4 of the Wine and Beerhouse Act, 1870, in exactly the same position as an application under 9 Geo. 4, c. 61, for a transfer of a licence to sell intoxicating liquors by retail. By s. 4 of that Act, the justices have power to license "persons intending to keep inns theretofore kept by other persons being about to remove from such inns." In the present case there was a person, Webb, intending to keep an inn upon premises in respect of which for some years past there had been a licence in the name of Wallace; but the premises were not, and had not for twelve or thirteen years been, kept as an inn by Wallace or by anybody else. Somebody else had kept them as a draper's shop, Wallace having nothing at all to do with them. It follows that Wallace was not "about to remove from the same"; he had never lived there. It is, therefore, quite clear that s. 4 did not and could not apply to the case, that the justices acted without jurisdiction, and that their decision was

(1) [1895] 1 Q. B. 214, 616.
(2) (1875) 1 Q. B. D. 55.
(3) (1888) 20 Q. B. D. 430.
(4) Ante, p. 663.

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wholly wrong. Speaking for myself, I confess I should certainly have thought, primâ facie, that the case came well within that class of cases in which acts not strictly judicial and done without jurisdiction have been questioned and annulled by certiorari. It has, however, been held in *Reg.* v. *Sharman, Ex parte Denton* (1), that a decision of licensing justices cannot be questioned by certiorari, and to that decision of the Divisional Court we are bound, so long as it stands, to conform. We cannot, therefore, entertain the question whether a certiorari should be granted in this case, and the rules for a certiorari must consequently be discharged. We have next to consider whether the case is one in which a mandamus ought to be granted directing the justices to hear and determine the matter according to law. It is obvious that the distinction between an erroneous decision and a failure to hear and determine according to law may be very fine, and the cases on the subject shew that it is so. I take the governing principle to be that if the justices have applied themselves to the consideration of a section of an Act of Parliament, and have, no matter how erroneously, determined the question which arises upon it before them, their decision cannot be reviewed by process of mandamus. That is so whether there is an appeal from their decision or not. If there is an appeal, mandamus will not lie; if there is not, their decision is final. But when it appears that they have taken into consideration matters which are absolutely outside the ambit of their jurisdiction, and absolutely apart from the matters which by law ought to be taken into consideration, then they have not heard and determined according to law. I may give as an instance the case of *Reg.* v. *Bowman* (2), which came before a Divisional Court a short time since. There the justices did something not very far off putting the licence up to a kind of auction, and said that nobody should have it who was not willing to pay 1000*l.* for it. The Court granted a mandamus, holding—rightly, I think—that the justices had taken into consideration matters outside and apart from any of their statutory powers, and therefore that they had not heard and determined according to law.

(1) Ante, p. 578. (2) Ante, p. 663.

Another instance is the case, referred to by my brother Kennedy, of *Reg.* v. *De Rutzen* (1), where again the justices had taken into consideration matters outside the statutes under which they purported to act, and the Court granted a mandamus to hear and determine the application before the justices according to law. Here the matters which the justices have taken into consideration apart from the statute are not stated upon affidavit, but it is sufficient if it can be demonstrated that they must have considered such matters. When it is demonstrated, as it is here, that they granted a licence in respect of a place which was not an inn, and had not theretofore been kept as an inn, and from which there was no person who had kept it about to remove, it is plain that they cannot have decided according to law; they must have acted upon some extraneous consideration not warranted by the statute. It is not a question of a misconstruction of the statute. No construction can alter the plain words of the Act, or make the premises in question premises theretofore kept as an inn, or Wallace a person about to remove from them. It is a case in which the justices have so far departed from the plain words of the Act—deciding upon some extraneous consideration, I know not what—that they cannot be said to have heard and determined according to law. Under those circumstances I have no doubt that a mandamus is the proper remedy.

KENNEDY J. I am of the same opinion. The grant of the licence to Webb purports, on the face of it, to be made under s. 4 of 9 Geo. 4, c. 61. That section provides that the power to grant what in more recent legislation is called a "transfer" shall be exercised by the justices in certain cases only. The jurisdiction, by the very terms of the section, is founded upon the existence of a certain state of things, namely, that the premises have been theretofore kept as an inn, and that a person holding a licence is about to remove from the inn in respect of which he held it. Stopping there, it is sufficiently clear that the justices had no jurisdiction to grant a transfer, because the premises had not been kept as an inn, and Wallace was not a person who, having kept them as an inn, was about to remove

(1) 1 Q. B. D. 55.

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from them. But, further, as I read s. 4, the words "in the cases and in the manner and for the time hereinafter directed" relate to s. 14. In that section a number of cases are given in which a transfer may be granted, the only one applicable here being where "a person so licensed, or the heirs, executors, administrators, or assigns of any person so licensed, shall remove from or yield up possession of the house specified in such licence." As Wallace did not occupy the house in any sense he could not be said to have removed from or yielded up possession of it. No explanation has been given, and I cannot conjecture, how the justices came to grant this transfer. Then comes the only real question in this case—what is the remedy? Really the justices have acted in a case in which they had no jurisdiction at all. As to the remedy by certiorari, I need only say that we are bound by the decision of the Divisional Court. As to mandamus, I think the Courts have been rather more liberal in granting a mandamus in licensing cases than in most other cases. The judgment and the interlocutory observation of Blackburn J. in *Reg.* v. *De Rutzen* (1) seem to shew that the main consideration, in determining whether the remedy by mandamus can be applied, is whether or not the licensing justices have heard and determined according to law. I do not say that the remedy applies where there has been a mere misconstruction of an Act of Parliament; but where, as here, they have disregarded the provision of the statute which gives them jurisdiction, and have considered matters which they ought not to consider, then they have made themselves subject to the remedial powers of the process by mandamus.

WILLS J. I wish to add that I agree with the observations of my brother Kennedy with respect to s. 14 of 9 Geo. 4, c. 61.

*Rule absolute for a mandamus.*
*Rules for a certiorari discharged.*

Solicitors for applicant: *Lloyd-George, Roberts & Co., for Herbert Lewis & Davies, Liverpool.*

Solicitors for defendants: *John Hands, for Edwin Berry, Liverpool.*

(1) 1 Q. B. D. 55.

W. A.

[IN THE COURT OF APPEAL.]

C. A.
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*April* 20.

# THE ROYAL COLLEGE OF MUSIC, APPELLANTS *v.* THE VESTRY OF SAINT MARGARET'S AND SAINT JOHN'S WESTMINSTER, RESPONDENTS.

*Local Government—Rates—Exemption—Society instituted for Purposes of the Fine Arts—Royal College of Music—Society not making "any Dividend, Gift, Division, or Bonus in Money unto or between any of its Members"—Scientific Societies Act*, 1843 (6 & 7 *Vict. c.* 36), *s.* 1.

The Royal College of Music was a society created and incorporated by royal charter, for the advancement of the art of music by means of a teaching and examining body, charged with the duty of providing musical instruction of the highest class, and of rewarding with academical degrees and certificates of proficiency, and otherwise, persons, whether educated or not at the college, who on examination might prove themselves worthy of such distinctions, for the promotion and supervision of musical instruction in schools and elsewhere conducive to the cultivation and dissemination of the art of music, and for the encouragement and promotion of the cultivation of music as an art. The college erected a building on land demised to them by a lease containing a stipulation that the building should be used for the purposes of their charter only, and it was so occupied and used by them. The charter prohibited any "dividend, gift, division, or bonus in money" to the members. The college paid out of its funds remuneration to certain members of its teaching staff who were also members of the society:—

*Held* (affirming the judgment of Hawkins and Channell JJ.), that the college was a society instituted for purposes of the fine arts exclusively within the meaning of the Scientific Societies Act, 1843, s. 1, and did not, in making the above-mentioned payments to members of the teaching staff "make any dividend, gift, division, or bonus in money" to its members within the meaning of the section; and therefore that the society was entitled to exemption from parochial rates in respect of the building occupied by them as aforesaid.

APPEAL from the judgment of a Divisional Court (Hawkins and Channell JJ.) upon a case stated pursuant to 12 & 13 Vict. c. 45, s. 11. (1)

The Royal College of Music was created and incorporated by royal charter, dated May 23, 1883, and is governed by and

(1) Ante, p. 304.

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under this charter and two amendments thereof made in 1884 and 1896, and by regulations made under the charter. The college and its affairs are managed and carried on wholly in accordance with, and for the purposes of, the charter and amendments, and wholly in accordance with the regulations.

The charter recited that it was granted as Her Majesty was desirous of promoting the advancement of the art of music by the establishment of the college. The provisions of the charter with regard to the college (so far as material to this report) were as follows: "Purposes of corporation: The purposes for which the corporation is founded are, first, the advancement of the art of music by means of a central teaching and examining body, charged with the duty of providing musical instruction of the highest class, and of rewarding with academical degrees and certificates of proficiency and otherwise persons, whether educated or not at the college, who on examination may prove themselves worthy of such distinctions and evidences of attainment; and, secondly, the promotion and supervision of such musical instruction, in schools and elsewhere, as may be thought most conducive to the cultivation and dissemination of the art of music in the United Kingdom; and, lastly, generally, the encouragement and promotion of the cultivation of music as an art throughout our dominions."

The charter then provided for the appointment of a president, vice-presidents, and a council of the society, consisting of two ex-officio members and twenty-four ordinary members to be elected from time to time by general meetings of the corporation as therein provided, but that a person being the director of, or engaged in teaching, in the college should not be qualified to be elected or sit as a member of the council, and any person who, being a member of the council, should become director of, or be engaged to teach in, the college should vacate his seat on the council. Provision was made by the charter for the appointment of a director of the college, and of a board of professors, consisting of such number of the teaching staff of the college as might be determined from time to time by the council, the members of the board to hold office during the pleasure of the council, and to be chosen by the executive

committee of the council out of persons nominated by the director.

The charter contained the following further provisions: "As to the pupils: The pupils shall consist of scholars, exhibitioners, and students. The scholars and exhibitioners shall be pupils who have obtained scholarships and exhibitions entitling them, wholly or partially, to the privileges of gratuitous education and maintenance, or one of such privileges, or to some description of aid in their education. The students shall be pupils who have obtained neither scholarships nor exhibitions." "As to the graduates: The council shall have power to cause examinations to be held of pupils of the college, and of other persons who may present themselves for examination, and after examination to confer, in such mode and on compliance by the candidate with such conditions as they may from time to time determine, all or any of the degrees of bachelor in music, master in music, and doctor in music." "As to certificates of proficiency and other rewards: The council shall have power to cause examinations to be held of pupils of the college, and of other persons who may present themselves for examination, and after examination to grant, in such mode and on compliance by the candidate with such conditions as they may from time to time determine, certificates of proficiency in such branches of music as the council may from time to time determine." "Conduct of business: The instruction of the pupils shall be conducted by a teaching staff under the direction and superintendence of the director and board of professors, subject to the regulations made by and to the control of the council. The powers of [here followed an enumeration of various powers which need not be referred to] remunerating by salary, fees, or otherwise, or partly in one way and partly in the other, the director, teaching staff, and other officers and servants of the college, and generally all other powers, whether similar or not to those above mentioned, concerned in or incidental to the establishment and maintenance of the college, and the carrying into effect the purposes for which the corporation is founded shall be vested in the council. The council may negotiate with any musical bodies as to the conditions on which they will be

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willing to join with or be amalgamated wholly or partially with the corporation. The council may establish scholarships, exhibitions, and fellowships. They may make terms with any donors as to the appropriation of their donations for a building fund, or the endowment of fellowships, scholarships, or exhibitions, or otherwise as they may think expedient. The council may affiliate any musical schools or societies with the corporation. The council may pay all expenses incurred in obtaining this our charter, and may do all acts and things, whether similar in character or not to those above mentioned, and may dispose of any funds in their power in such manner as in their discretion may be thought expedient, for promoting the purposes for which the corporation is founded. The council may provide homes and boarding-houses for pupils of the college. The council may enter into any engagements with the government respecting musical instruction in elementary or other government schools, including the inspection of schools, the conduct of examinations, and providing wholly or partially for the supply or education of musical teachers, the appropriation of scholarships, or otherwise to persons educated in such schools, and any other matter in relation to the promotion of music in connection with Government aid which may be thought expedient." "The members of the corporation: The following persons shall be members of the corporation—that is to say, (1.) The president for the time being; (2.) The vice-presidents for the time being; (3.) The members of the council for the time being; (4.) The director and members of the board of professors for the time being; (5.) The graduates; (6.) The donors."

The charter further provided that a general meeting of the corporation should be held once at the least in every year at such time as should be fixed by the council, and every member of the corporation present at the meeting should be entitled to one vote; that the corporation should provide for the instruction of their pupils, whether scholars, exhibitioners, or students; and that the council might from time to time make, add to, alter, or rescind regulations in relation to (among other things) —(3.) the fees to be charged in respect of degrees and certificates

of proficiency and otherwise; (7.) any other matter or thing whether similar or not to those above mentioned required for the purpose of supplementing the provisions of the charter, or for carrying into effect the purposes thereof. By the general regulations of the college the director is to engage the services of such teachers as he may deem necessary to carry on the work of the college, and with the concurrence of the board of professors from time to time lay down the course of instruction to be observed by the teachers and pupils of the college.

By the amendment of 1896 it is provided:—

"The Royal College of Music shall not make any dividend, gift, division, or bonus in money, unto or between any of its members.

"No graduate of the Royal College of Music competing for, entitled to, or holding, a fellowship from, or in the gift of, the corporation, shall, while he is competing for, or entitled to, or holds, such fellowship, be a member of the corporation."

By the regulations it is provided:—

"The buildings of the Royal College of Music shall be used exclusively for the transaction of its business, and the carrying into effect the purposes of the charter, and the amendments thereof."

The building of the college is situate in Prince Consort Road, in the parish of Saint Margaret, and is built upon land demised to the college by indenture, dated December 30, 1891, by the Commissioners for the Exhibition of 1851, for 999 years from June 24, 1890, at a nominal annual rent amounting to 5*l*. The lease provides: that the college is to erect on the demised land buildings suitable for a college building for the purposes of the charter of the college; that during the term the college shall use the demised premises, and every part thereof, for the purposes of the royal charter by which the college is incorporated, and of any charter or charters thereafter granted by way of supplement thereto, or in substitution therefor, and for no other purpose whatever, and that the college shall not assign, underlet, or part with the possession of, the premises, or any part thereof, to any corporation or person whatever. The lease contains the usual powers of re-entry.

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The building was duly built and completed out of funds provided by private munificence. This is the building which is the subject of the rates hereinafter mentioned.

The building rated is, and has been, occupied wholly and exclusively by the college, and solely for the transaction of its business, and for carrying into effect the purposes of the college, as limited by the charter, the amendments thereof, and its regulations. The college has carried out, and carries out, no purpose other than the "Purposes of the Corporation" defined in the charter.

The college is supported in part by annual voluntary contributions, receiving annual voluntary subscriptions from a number of individuals, and from the Commissioners for the Exhibition of 1851, and an annual subscription from Her Majesty out of an annual grant voluntarily voted to Her Majesty by Parliament, and available, by the terms of the vote, to Her Majesty for the purpose.

The following is the statement of the receipts of the college for the year ending April 30, 1896, as contained in the revenue account of the college for that year, namely:—

| | £ | s. | d. |
|---|---|---|---|
| To balance from April 30, 1895 . . | 149 | 7 | 11 |
| ,, Annual subscriptions . . . | 1,132 | 8 | 0 |
| ,, Dividends and interest . . . | 4,639 | 4 | 6 |
| ,, Fees from pupils and candidates . | 11,535 | 12 | 8 |
| ,, Government grant . . . | 500 | 0 | 0 |
| ,, The Associated Board of the Royal Academy of Music and the Royal College of Music for local examinations . . . . . | 800 | 0 | 0 |
| ,, Repayments by pupils, &c. . . | 23 | 12 | 8 |
| | 18,780 | 5 | 9 |

The item "Dividends and interest" includes sums received from investments of donations made to the college upon trust for scholarships, exhibitions, prizes, and maintenance of scholars. The fees from candidates are sums taken from candidates at certain of the college examinations for the purpose

of going towards the expenses of such examinations. The fees from pupils are payments made by the college pupils (not entitled to free tuition) in respect of tuition; these fees are expended in meeting the expenses incurred in and with respect to the tuition and pupils, but the fees are insufficient to defray these expenses, and the teaching by the college is not carried on at a profit, or with the view to making a profit over and above the expenses. The college does not train either teachers, or professional musicians, or singers, as such, having no course of instruction arranged with that view, but teaches the science and art of music in all its branches to all its pupils alike, and imparting the same courses of musical instruction to all. Without the annual voluntary contributions, the donations, and the dividends and interest from invested funds, the college cannot meet its expenses.

The college has not made, and does not make, any dividend, gift, division, or bonus in money, unto or between any of its members.

On April 10, 1897, the respondent vestry made two separate rates, one being a poor-rate, and the other included a general rate (including school board rate), and a rate purporting to be called a sewers rate.

The building occupied by the college for the purposes aforesaid was assessed to the said rates.

The question for the opinion of the Court was:—

Is the Royal College of Music exempt from being assessed or rated, and from liability to payment to county, borough, parochial, and other local rates and cesses, in respect of the said land and building, pursuant to 6 & 7 Vict. c. 36?

The Divisional Court gave judgment for the Royal College of Music.

*Bosanquet, Q.C.*, and *R. Cunningham Glen*, for the vestry. The Royal College of Music is not a society instituted for purposes of science, literature, or the fine arts exclusively, and is, therefore, not within the exemption conferred by s. 1 of the Scientific Societies Act, 1843. It is a society which exists mainly, or to a great extent, for the purpose of giving ordinary

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musical education to persons who wish to learn music whether for professional purposes or otherwise; and the case therefore comes within the principle laid down in *Reg.* v. *Institution of Civil Engineers.* (1) Ordinary musical education is not a purpose of a fine art within the section. Such education may indirectly promote the fine art of music, but in that sense the instruction given by the Institution of Civil Engineers promoted science. In order to confer exemption the purpose must be directly for the promotion of science, literature, or fine art.

[They cited on this point *Reg.* v. *Pocock* (2); *Commissioners of Inland Revenue* v. *Forrest* (3); *Savoy Overseers* v. *Art Union of London* (4); *Reg.* v. *Brandt* (5); *Scott* v. *St. Martin's-in-the-Fields Overseers* (6); *Mayor of Manchester* v. *Macadam.* (7)]

Secondly, this is not a society which does not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between its members. The bulk of its funds arises from fees paid by pupils and candidates, and to a great extent they are expended in remuneration to the teaching staff. The members of the board of professors, who are selected from the teaching staff, are members of the incorporation, and receive payments for their services as teachers out of the funds. Likewise any member of the teaching staff who may be a graduate is a member of the incorporation. Such payments out of the funds of the society to members of it come within the word "division" in the section. A society such as this, whose income is principally earned by the ordinary teaching of music and some of whose members make profit out of the teaching, is not the kind of society contemplated by the exemption, not being exclusively for the purposes of a fine art, nor a society which makes no division out of its funds among its members. The graduates, who obtain fellowships, receive payments out of the funds of the society. It is, no doubt, provided that while competing for or holding fellowships they are not to be members of the corporation, but they are members previously and have

(1) (1879) 5 Q. B. D. 48.
(2) (1846) 8 Q. B. 729.
(3) (1890) 15 App. Cas. 334.
(4) [1894] 2 Q. B. 609; [1896] A. C. 296.
(5) (1851) 16 Q. B. 462.
(6) (1855) 5 E. & B. 558.
(7) [1896] A. C. 500.

control of the funds, and they become members again as soon as the competition is over, or they cease to hold their fellowships. It is submitted that the terms of the amendment of the charter do not satisfy the prohibition against payments out of the funds of the society to members.

*Danckwerts*, and *A. Neilson*, for the Royal College of Music, were not called upon to argue.

A. L. SMITH L.J. This is an appeal from the judgment of a Divisional Court holding that the Royal College of Music is exempt from rateability by virtue of s. 1 of 6 & 7 Vict. c. 36. In my opinion that decision was right. In the case of *Art Union of London* v. *Overseers of Savoy* (1) I summarized the effect of the section as follows: "Upon reading s. 1 of the Act of 1843 (6 & 7 Vict. c. 36), it is obvious that, to bring a society within the exemption contained therein, it must be: firstly, a society instituted for the purpose of science, literature, or the fine arts exclusively; secondly, a society which is supported wholly or in part by annual voluntary contributions; thirdly, a society which shall not, and by its by-laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members; and, fourthly, a society which shall have obtained the prescribed certificate of a barrister, or the Lord Advocate." I think that is an accurate summary of the effect of the section. The point raised in that case was not the same as in the present case. The point there raised was whether the society was supported wholly or in part by annual voluntary contributions, while the point in the present case is whether the society comes within the words "instituted for purposes of science, literature, or the fine arts exclusively." That question depends upon the charter of the society and the facts stated in the special case. It appears to me that upon the construction of the charter and the facts so stated the true inference is that the society was instituted for the purposes of one of the fine arts, namely music, exclusively. The charter provides that "the purposes for which the corporation is founded are, first, the advancement of the art of music by means of a central teaching

(1) [1894] 2 Q. B. 609.

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A. L. Smith L.J.

and examining body, charged with the duty of providing musical instruction of the highest class, and of rewarding with academical degrees and certificates of proficiency and otherwise persons, whether educated or not at the college, who on examination may prove themselves worthy of such distinctions and evidences of attainment; and, secondly, the promotion and supervision of such musical instruction, in schools and elsewhere, as may be thought most conducive to the cultivation and dissemination of the art of music in the United Kingdom; and, lastly, generally the encouragement and promotion of the cultivation of music as an art throughout our dominions." In my opinion the purposes so described are all of them purposes of a fine art, namely music, exclusively within the meaning of the section. The words "instituted for purposes of science, literature, or the fine arts exclusively" must mean "instituted for the purpose of advancing, or disseminating, or propagating science, literature, or the fine arts." The only way, or at any rate one of the principal ways, in which the advancement or dissemination of the fine art of music can be effected is by teaching; and in my opinion it does not make the purposes for which the society was instituted any the less exclusively purposes of one of the fine arts, namely music, that the means by which the art of music is to be advanced or disseminated by the college is by teaching. I do not see that there is anything in the terms of the other provisions of the charter upon which the counsel for the vestry relied that goes outside the purpose of promoting the fine art of music exclusively. I entirely agree with the decision of the Divisional Court to the effect that this society was instituted for the purposes of a fine art, namely music, exclusively.

Then it was contended that the Royal College of Music was not within s. 1 of 6 & 7 Vict. c. 36, because it was not a society which did not and by its laws might not make any dividend, gift, division, or bonus in money unto or between any of its members. It was argued that that was so, because the professors were members of the society, and they received remuneration from the society as teachers. This question depends on the meaning of the words "dividend, gift, division,

or bonus in money" in the section. The counsel for the vestry contended that the word "division" covered any payment made by the society to anyone who was a member of the society. I do not agree with that contention. I think the word "division" points to something in the nature of a dividend, gift, or bonus, which is paid to members of the society as such, and does not include payments made to members of the society, not as being members, but by way of remuneration for services rendered by them to the society. It was further contended that the Royal College of Music was not within the exemption contained in s. 1, because graduates who were members of the society might get pecuniary benefit from the society by obtaining fellowships. I think that contention is met by the amendment of the charter, which took place in 1896, and which provides that no graduate of the Royal College of Music competing for, entitled to, or holding a fellowship from, or in the gift of, the corporation, shall, while he is competing for, or entitled to, or holds such fellowship, be a member of the corporation. I do not think, having regard to the terms of its charter as amended, that this society is one which does, or by its laws may, make any dividend, gift, division, or bonus in money unto or between any of its members within the meaning of the section. For these reasons I am of opinion that the judgment of the Court below was right, and this appeal should be dismissed.

CHITTY L.J. I am of the same opinion, and have very little to add. It appears to me that the Royal College of Music complies with the requisites mentioned in s. 1 of 6 & 7 Vict. c. 36. I think that it is a society instituted for the purposes of one of the fine arts, namely music, exclusively; it is supported wholly or in part by annual voluntary contributions; and, in my opinion, it does not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members. I inquired in vain of the counsel for the vestry what such a society was to do by way of advancing the fine art of music, if teaching music were excluded; because it seemed to me that, according to his contention, if the

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exemption of the society were to be preserved, its action would be so fettered that it would become useless for the purposes of its existence. The purposes of the society, as explicitly described in the charter, all appear to me to be exclusively for the advancement of the fine art of music. It was suggested, but I think unsuccessfully, that there are subsidiary portions of the charter which are inconsistent with the purposes of the society being exclusively "purposes of the fine arts" within the section. The fact that the charter provides for the employment of professors by the college, who are to teach music, has not in my opinion the effect contended for, because that is only means to the end proposed, namely, the advancement of the fine art of music. The fact that these professors, being members of the society, receive remuneration out of the funds, does not in my opinion take the case out of the words of the third condition of exemption mentioned in the section. The payments made to the professors are made to them as remuneration for services rendered. They are not made to them as members of the society. I cannot assent to the construction sought to be put upon the words "dividend, gift, division, or bonus in money" in the section by the counsel for the vestry. The contention that any payment made by the society to a person who happens to be a member of the society for services rendered puts the society outside the exemption contained in the section appears to me to be quite untenable. There is in my opinion, in the case of this society, no division of profits, or of any funds, for the personal advantage of the members as such which would come within the meaning of the words used in the third condition in the section. The purposes of the society, as expressly stated in the charter, are for the advancement of the fine art of music, and, I think, for that exclusively, and in my opinion there are no subsidiary purposes mentioned in the charter which militate against the purposes of the charter being as stated.

VAUGHAN WILLIAMS L.J. concurred.

*Appeal dismissed.*

Solicitor for vestry: *Gates.*

Solicitor for Royal College of Music: *H. T. Boodle.*

E. L.

## THE FIELD STEAMSHIP COMPANY, LIMITED *v.* BURR.

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*March* 16, 17, 22.

*Insurance, Marine—Policy—Insurance on Ship—Perils of the Seas—Consequential Damage, Underwriter's Liability for—Cost of Disposing of Cargo rendered Worthless by Sea Peril.*

A ship, insured under a time policy on hull and materials, machinery and boilers, against perils of the seas and all other perils, losses, and misfortunes which might come to her hurt, detriment, or damage, was, during the currency of the policy, injured through a collision in the Thames whilst making for London, her port of destination, a hole being knocked in her bottom. Her cargo, cotton seed, through the action of the water and mud which came through the hole, became rotten, offensive, and worthless, and neither the cargo owners nor their underwriters would pay freight or take delivery. After the collision part of the cargo was put into lighters in order to allow the ship to be taken into dry dock, where she was temporarily patched. Subsequently she was towed to the Millwall Dock to discharge the rest of the cargo, and thereupon the sanitary authority of the district ordered her to abate the nuisance caused by the offensive condition of the cotton seed and to remove it. The ship accordingly was taken down the river to Dagenham Pier, and her cargo was there discharged by contractors on to land belonging to them. In an action on the policy by the shipowners to recover from their underwriter the cost of dealing with the cargo between the date of the collision and the date of its arrival at Dagenham, and also the contractors' charges for discharging and disposing of it there :—

*Held*, that the plaintiffs were not entitled to recover any of such cost or charges.

COMMERCIAL CAUSE tried before Bigham J.

The facts of the case appear from the head-note to this report, and are fully stated in the judgment of the learned judge. (1)

The arguments, it is thought, also sufficiently appear from the judgment.

*Joseph Walton, Q.C.* (*Lewis Noad* with him), for the plaintiffs.

*Carver, Q.C.*, and *T. E. Scrutton*, for the defendant.

[In addition to the authorities mentioned in the judgment, *Pitman* v. *Universal Marine Insurance Co.* (2), *Svensden* v.

(1) Post, pp. 822, 823. (2) (1882) 9 Q. B. D. 192.

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*Wallace* (1), *Marine Insurance Co.* v. *China Trans-Pacific Steamship Co.* (2), and *The Mary Thomas* (3), were referred to.]

*Cur. adv. vult.*

March 22. The following written judgment was delivered by

BIGHAM J. This was an action brought to recover a partial loss alleged to be due by the defendant under a time policy on the plaintiffs' ship *Elmfield.*

The policy was on hull and materials, on machinery and boilers, valued at 10,000*l.*, and the perils insured against were, amongst others, "of the seas . . . . and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said ship, &c., or any part thereof."

During the currency of the policy the vessel was carrying a cargo of cotton seed on a voyage from Alexandria to London under a charterparty made by the plaintiffs with Messrs. Barnett Brothers, acting for the charterers. On December 20, 1896, she arrived in the Thames, when a vessel called the *Derwent* came into collision with her, and caused such serious damage to her hull below the water-line that it became necessary to run her ashore in order to prevent her from sinking in deep water. During the next ten days part of her cargo was put into lighters, and by this means she was sufficiently lightened to enable her to be towed to the Tilbury Dry Dock, where she was temporarily patched. On January 5, 1897, she was towed to Millwall Dock, where it was intended that the remainder of her cargo should be discharged. It was found, however, that by the action of the water and mud which had found their way into the ship in consequence of the casualty, the cargo had become rotten and offensive and was a nuisance, and thereupon the sanitary authorities, acting under the powers of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ordered the ship to abate the nuisance and to remove the cotton seed. In the meantime the owners of the cargo had abandoned the cargo to their underwriters, and neither the cargo owners nor their underwriters

(1) (1884) 13 Q. B. D. 69; (1885) 10 App. Cas. 404.

(2) (1886) 11 App. Cas. 573.

(3) [1894] P. 108.

would pay freight or take delivery, alleging, as the fact was, that the cargo had ceased to be cotton seed and had become worthless. The cargo owners and their underwriters were justified in taking up this position: see *Asfar & Co.* v. *Blundell.* (1)

In these circumstances the plaintiffs made a contract with a firm of Samuel Williams & Sons, who are the owners of a pier at Dagenham, near the mouth of the river, to discharge the cargo and to spread it out on some land at a short distance from the pier at a charge of 5*s.* per ton, and so to get rid of it. The ship accordingly left the Millwall Dock for Dagenham Pier, and was there discharged by Messrs. Samuel Williams & Sons.

The claim against the defendant and his co-underwriters on the hull was a very large one, amounting to many thousands of pounds, but all disputes in connection with it have been settled between the parties, except as to items amounting in the aggregate to 1046*l.* 12*s.* 10*d.* These items may be divided into two classes: (1.) the charge incurred in dealing with the cargo between the date of the casualty and its arrival at Dagenham, amounting to 287*l.* 2*s.* 10*d.*; and (2.) the charges of Messrs. Williams, amounting to 759*l.* 10*s.*, for discharging and disposing of the cargo at Dagenham.

The question is whether the defendant and his co-underwriters are under any liability to recoup the plaintiffs any, and if so what, part of this expenditure.

The matter in the first instance passed into the hands of Messrs. Robert Lindley, Sons & Davison, a firm of average adjusters of great experience, who were of opinion that the charges in question ought not to fall on the underwriters on ship, but ought to be paid by the Indemnity Club, in which the plaintiffs' ship was entered. After some correspondence they appear, however, to have modified their view, and to have suggested that perhaps the underwriters on ship should be held liable for what the average adjusters called the "bare cost of removing the damaged cargo from the ship." This suggestion did not satisfy either the Indemnity Club or the underwriters

(1) [1895] 2 Q. B. 196; [1896] 1 Q. B. 123.

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on ship, and thereupon this action was brought in the name of the shipowner to get the dispute settled.

Mr. Joseph Walton, who represented the plaintiffs, contended that the expenditure in question was recoverable as having been caused by "perils of the sea, and by other perils, losses, or misfortunes which had come to the hurt, detriment, or damage of the ship," within the meaning of the policy. He admitted that, as between the shipowner and the cargo owner, it would have been the duty of the former, had the cargo arrived as cotton seed, to have put it out of the ship and to have borne the cost of doing so; but he said that when, as in this case, that duty did not arise by reason of the cargo owner being relieved from the correlative duty of recovering the cargo, the ship, in the circumstances of this case, became injured or damaged by the presence of a large mass of useless matter due to the incursion of the water and its action on the cargo, and that the cost of dealing with it and disposing of it in accordance with the law was as much part of his clients' loss by the perils insured against as the cost of repairing the hole in the ship's bottom. He further suggested that the repairs to the bottom of the ship could not be executed until the cargo was put out, and that, therefore, he was entitled to the cost of discharging the cargo; and finally he said that in any event he was entitled to the difference (which he alleged was considerable) between what it would have cost to discharge cotton seed and the actual cost of discharging the putrid mass in the ship. His argument went so far as to suggest that, even if the structure of the ship had not been injured at all, his clients would have been entitled to recover; as, for instance, if the sea water had got to the cargo through the hatches, and had brought about consequences similar to those which had in fact happened in this case.

I think his contentions are not well founded. There are cases in which the underwriters on a policy such as this may be liable although the vessel suffers no physical injury, as, for instance, where part of the cargo is jettisoned and it becomes necessary to make good the loss in general average, or perhaps where money has been spent under the suing and labouring

clauses. But these are cases which depend upon different considerations. I think that where the insurance is upon the hull, materials, and machinery of a ship it is essential, before any claim at all can be made against the underwriter, either that the shipowner should be deprived of his ship, or of the use of her, or that physical damage should happen to it by the direct action of one of the perils insured against. It is not enough for the shipowner to say, "The perils of the seas have caused loss to me"; he must go further, and shew that they have caused the loss of or damage to his ship. Take an instance; the perils of the sea, storms, and adverse winds may delay a ship on her voyage, causing her to occupy twice the time she otherwise would do. This is a grievous loss to the shipowner; but it is clear he gets no compensation from his underwriter either for the cost of keeping the ship during the delay or for the extra wear and tear she undergoes; and the reason is because the underwriters only promised to indemnify him against loss of or damage to the thing insured which may happen from the perils included in the policy, amongst which are not those ordinary incidents of a voyage which every ship must encounter when she sails the ocean. Neither the wages, nor the provisions, nor the damages arising from the long user of the ship form any part of the thing insured; and I think the cases shew, and I am satisfied that the practice in business points the same way, that, even when the ship suffers actual physical damage from the perils insured against, the underwriter's liability is to be limited to what may reasonably be regarded as the cost of making good the particular damage in question. Consequential damage which the shipowner may suffer the underwriter is not responsible for. The case of *Robertson* v. *Ewer* (1) is in point. There the policy was on the ship. The ship was detained at Barbados by order of the British commander at that station. The claim was for damage arising by reason of the arrest, and the damage consisted of the cost of wages and provisions during the detention. It was argued that it was not necessary that the damage should be an immediate one to the ship, and that it was sufficient, in order

(1) (1786) 1 T. R. 127.

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to charge the underwriters, if the loss happened in consequence of any peril insured against. It is worth while to refer to the judgments. Lord Mansfield C.J. said: "There is no authority to shew that, on this policy, the insured can recover for such a loss; but it is contrary to the constant practice. On a policy on a ship, sailors' wages or provisions are never allowed in settling the damages. The insurance is on the body of the ship, tackle, and furniture; not on the voyage or crew. In this case it is admitted that there was no damage done to the ship, tackle, or furniture, and therefore I think the direction was right, and that the plaintiff ought not to recover." Willes J. said: "This is not like the case put of a ransom; that was a loss on the ship itself; nor like the other case mentioned at the bar of a ship which, having been sunk, had been weighed up again; there likewise it was a damage done to the body of the ship." Buller J.—and I rely on his judgment—said: "I take it to be perfectly well settled that the insured cannot recover seamen's wages or provisions on a policy on the body of the ship; those are not the subject of the insurance. The case put by the plaintiff's counsel proves the rule. For, if the ship had been detained in consequence of any injury which she had received in a storm, though the underwriter must have made good that damage, yet the insured could not have come upon him for the amount of wages or provisions during the time that she was so repairing. Here the ship itself was safe, and the Court only look to the thing itself which is the subject-matter of insurance; and the wages and provisions are no part of the thing insured." So in the case of *De Vaux* v. *Salvador*. (1) There the plaintiff's ship came into collision with a steamer, and both were damaged and had to be repaired. In an arbitration each was ordered to pay one-half of the joint expenses, the result of which was that the plaintiff had to pay a balance to the owner of the steamer. Further, the plaintiff's ship was detained for some time while her repairs were being executed. The plaintiff sued his underwriter on ship for the money he had had to pay to the steamship owner, and also for the wages and provisions of the ship during the detention. It

(1) (1836) 4 A. & E. 420.

was argued that the one could be recovered under the general words in the policy, "all other perils, losses, and misfortunes," and the other because the wages were incidental to the repairs. The Court declined to allow either claim. As to the wages, the Court considered the question to be concluded by authority, and as to the claim for the money paid to the steamship owner, the Court thought that the cause was too remote from the consequence; the Court pointing out that what the underwriter was responsible for was the injury directly caused to the plaintiff's own ship by the collision—by which I understand the Court to have meant that there the liability stopped. The text-books are to the same effect: see Park on Marine Insurance, 8th ed. p. 115; Arnould, 6th ed. pp. 727–30, 800; Benecke's Principles of Indemnity in Marine Insurance, p. 462. It is perhaps worth while to read the passage in the last of these three text-books. Mr. Benecke says: "It will not be superfluous to observe that it has been determined in several instances in this country that the underwriter on the ship shall not be liable for the charges of wages and maintenance of the crew. Indeed, as the underwriter upon the ship guarantees only the safety of the *ship*, and as he has consequently nothing to do with the longer or shorter duration, or with the profit or loss of the *voyage*, it is clear that nothing can fall to his charge except the actual loss or damage of the ship, and the expenses incurred for the purpose of preventing or repairing such loss. The master and crew are engaged by the shipowner for the purpose of completing the object of the voyage, which is to earn freight, and in the same manner as the proprietor of the cargo has a right to expect that the owner will at his expense provide a crew sufficient for taking care of the cargo and for conducting it to the place of its destination, so the underwriter has a right to expect that the ship will be sufficiently manned for the purpose of being well conducted and taken care of. The owner, therefore, owes the service of the crew to the freighter and to the ship herself during the whole voyage, and consequently also during the time of repairs or detention, which time is a part of the voyage, and he cannot call upon the underwriter for expenses occasioned by occurrences which are foreign to his contract."

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Now, applying the law as laid down in these authorities to the present case, I come to the conclusion that the cost of dealing with and unloading and disposing of the cargo, or, as Mr. Walton calls it, the filthy mass into which the cargo has been changed, is not a loss which has happened to the thing insured by any of the perils insured against. Sea perils or no sea perils, the shipowner has to empty his ship if he ever intends to use her again, and therefore the cost of doing it cannot be said to be rendered necessary by reason of the perils insured against; it has to be incurred any way, and the fact that in the one case the shipowner would by discharging the cargo become entitled to his freight, whereas in the other case he cannot get his freight, seems to me not to concern the underwriter on ship at all, and if the shipowner is not entitled to the cost of discharging, it follows, a fortiori, that he is not entitled to the cost of dealing with or disposing of the cargo.

As to the contention that the plaintiff is entitled to be paid the difference between what would be the cost of discharging the cotton seed and the actual cost of discharging the material which was in the ship, I think that also is too remote. It constantly happens that cargo arrives so damaged by sea water as to make it more difficult and expensive to handle in the discharge than it otherwise would be. But who has ever heard of a claim against the underwriter on a hull for such a loss as that? The claims are, in my opinion, too remote, and cannot fairly be regarded as forming part of the cost of repairs.

I find as a fact that the plaintiff has been fully paid by the underwriter for all that can properly be called the cost of repairing. He has, as it seems to me, incurred further consequential loss; but it is a loss for which the defendant is not in any way liable.

*Judgment for the defendant.*

Solicitor for plaintiffs: *William A. Crump.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

W. A.

## HOME MARINE INSURANCE COMPANY, LIMITED *v.* SMITH.

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*April* 26, 27.

*Insurance, Marine—Policy—Reinsurance—"Open Cover"—Risks to be afterwards declared—"Contract for Sea Insurance"—Contract not expressed in a Policy—Invalidity—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 93, 95.

A "covering note," or "open cover," by which underwriters undertake to reinsure marine risks to be afterwards declared, is not a policy of sea insurance, within the meaning of the Stamp Act, 1891, and therefore cannot be stamped after execution, and produced in evidence, on payment of a penalty, under s. 95, sub-s. 2, of that Act, but it is a contract for sea insurance, which, not being expressed in a policy, is invalid under s. 93, sub-s. 1, and therefore no action can be maintained on it, either as a contract for sea insurance, or as a contract to issue a policy.

Trial before Mathew J. in the Commercial Court of a preliminary question in an action.

The points of claim were as follows:—

1. By a contract of reinsurance on July 26, 1895, the defendant, inter alia, agreed to reinsure the plaintiffs to the extent of the excesses over certain amounts, limited as therein agreed, upon risks which the plaintiffs had then taken, or might thereafter take, on goods by certain steamship lines therein mentioned. The amount of the said reinsurance was 4000*l.*, and the part thereof taken by the defendant was 400*l.*

2. In the month of June, 1896, goods per the *Golden Fleece*, a steamer belonging to one of the said agreed lines, were totally lost by perils by the said contract insured against. The plaintiffs were original insurers of the said goods, and as such were liable to pay, and have paid, for total loss and charges in respect thereof, 5008*l.* 4*s.* 5*d.* The reinsured excess over the plaintiffs' reserved line of 1500*l.* was 3508*l.* 4*s.* 5*d.*, and the defendant's proportion thereof is 350*l.* 16*s.* 5*d.*, which the defendant has not paid.

3. Alternatively the plaintiffs say that they are, under the same contract, entitled to have issued to them by the defendant a duly subscribed policy in respect of the said goods, and to have paid to them thereunder the aforesaid loss.

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Points of defence were delivered, of which the following is here material:—

3. There was no contract of reinsurance expressed in a policy sufficient to satisfy the requirements of the statute 54 & 55 Vict. c. 39, s. 93. (1)

The document which was relied on by the plaintiffs as a contract of reinsurance was, so far as here material, in the following words and figures: "Open Cover, 30/6/97. Dawson Brothers" (the plaintiffs' brokers). "Cash. Steamer or Steamers, U. K. or Continent $\frac{\text{and}}{\text{or}}$ America, R. I." (reinsurance). "Rates as per indorsement." Then followed a statement of the amounts taken by each underwriter, and initialled by them, including 400*l.* initialled by the defendant. "F. G. A. and Y. A. Rules. Deviation Clause. Old or new B. L. including all risks from warehouse, lighterage, and until delivered to destination. Negligence Clause. 4000*l.*" (this was the limit of the excess taken on any one ship). Indorsed was a list of steamship lines on which excesses on goods were insured, including the Kerr Line, with statements of the rate of premium.

This document did not specify the names of the underwriters, except by initials as above stated, and it was not stamped.

For the purposes of the cause the defendant admitted—

"1. That on or about June 9, 1896, the *Golden Fleece*, a steamer of the Kerr Line, was totally lost by perils of the sea, at or near Morant Point lighthouse off the south-east point of the island of Jamaica.

"2. That part of the cargo of the *Golden Fleece* was totally lost with her."

An order was made at chambers that the question raised under paragraph 3 of the defence be tried, and that, for the purposes of the trial of that question, the Court was to assume that all penalties (if any be necessary) had been paid.

April 26. *Carver, Q.C.*, and *J. A. Hamilton*, for the plaintiffs. The document called an "open cover," on which the plaintiffs rely, is a policy of sea insurance, within the meaning

(1) 28 Geo. 3, c. 56, ss. 1, 2, was also relied on, but this point was abandoned in argument.

of the Stamp Act, 1891 (1), s. 93, and therefore, by s. 95, sub-s. 2, can be stamped after execution on payment of the prescribed penalty, and can be produced in evidence to support the plaintiffs' claim. If this is not so, then the document is not "a contract for sea insurance," within the meaning of s. 93, and can be relied upon as a contract to issue a duly subscribed policy, for breach of which contract the plaintiffs are entitled to recover. One or other of these two propositions must be correct, so that the defendant is in a dilemma. The requirements of s. 93, sub-s. 3, are sufficiently complied with, for the particular risk or adventure is specified by anticipation, so far as it is possible under the circumstances to specify it, the names of the underwriters are specified by their initials, and the sums insured are the sums initialled by the different underwriters, in the present instance 400*l.* initialled by the defendant. The document is therefore a valid contract of sea insurance, on which the plaintiffs are entitled to recover.

[MATHEW J. Is there any instance to be found of a successful action on a slip?]

The point has never been raised since 1876, when the first Act allowing policies of sea insurance to be stamped after execution (2) was passed. *Fisher* v. *Liverpool Marine Insurance Co.* (3) was before that Act, and if the same point were now to arise it would be decided the other way, and if this document is analogous to the slip in that case, it can be enforced, subject to the penalty, for an action can now be maintained upon a slip

(1) 54 & 55 Vict. c. 39. By s. 93, "(1.) A contract for sea insurance" (with an exception not here material) "shall not be valid unless the same is expressed in a policy of sea insurance . . . ."

"(3.) A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months."

Sect. 95 prohibits, with certain exceptions, the stamping of policies of sea insurance after execution,

"(2.) Provided that a policy of sea insurance shall, for the purpose of production in evidence, be an instrument which may legally be stamped after the execution thereof, and the penalty payable by law on stamping the same shall be the sum of 100*l.*"

(2) 39 & 40 Vict. c. 6, s. 2, repealed by 54 & 55 Vict. c. 39, s. 123, and re-enacted in s. 95, sub-s. 2.

(3) (1873) L. R. 8 Q. B. 469, affirmed (1874) L. R. 9 Q. B. 418.

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when it is stamped. Moreover, this document is not exactly identical with a slip. If this view is not correct, then the other point arises. A contract of sea insurance does not include every contract relating to, or leading up to, sea insurance, as, for instance, the articles of association of an insurance company, or an agreement made before the building of a ship, to insure the ship when built. This is nothing more than an agreement to insure risks, which possibly may never arise, if and when they arise.

*Joseph Walton*, Q.C. (*Scrutton* with him), for the defendant. This is a contract of sea insurance which is not expressed in a policy, contrary to s. 93, sub-s. 1, of the Stamp Act, 1891, and therefore cannot be stamped and produced in evidence under s. 95, sub-s. 2, for that clause provides for the stamping of a "policy," not a "contract." There is no proper specification of the sum or sums insured, for there is no limit of amount, by means of which the amount of the stamp can be fixed. The cases decided before 1876 are still applicable and binding, and the effect of those decisions is that the action cannot be maintained except on a policy. This is clearly the effect of *Ionides* v. *Pacific Insurance Co.* (1) In that case Blackburn J., in delivering the judgment of the Court of Queen's Bench, said: "The Legislature, for the purpose of protecting the revenue, had by the very strongest enactments provided that no such instrument should be given in evidence for any purpose; but all those enactments are repealed by 30 & 31 Vict. c. 23 (2), and the law is now governed by the 7th and 9th sections of that Act. By s. 7 no contract or agreement for sea insurance shall be valid unless expressed in a policy. And by s. 9 no policy shall be pleaded or given in evidence in any court unless duly stamped. As the slip is clearly a contract for marine insurance, and is equally clearly not a policy, it is, by virtue of these enactments, not valid; that is, not enforceable at law or in equity." (3) This language is applicable to the present case, and directly answers both the points relied on for the plaintiffs.

(1) (1871) L. R. 6 Q. B. 674, affirmed (1872) L. R. 7 Q. B. 517.

(2) Repealed by 54 & 55 Vict. c. 38, s. 28, and c. 39, s. 123.

(3) L. R. 6 Q. B. at p. 685.

*Mackenzie* v. *Coulson* (1) and *Cory* v. *Patton* (2) were also referred to in the course of the argument.

*Carver, Q.C.*, replied.

*Cur. adv. vult.*

April 27. Judgment was delivered by

MATHEW J. This case raises a point of some importance. The question for my decision is, whether, under the Stamp Act, 1891 (54 & 55 Vict. c. 39), a slip can be stamped and sued on as a policy of sea insurance. The plaintiffs in the present action are a company formed for the purpose of marine insurance, and the defendant is one of a group of underwriters, who it is alleged have entered into contracts of reinsurance. The document which it is sought to enforce is variously described as a slip and as a covering note. The document was initialled by the underwriters, and is expressed to cover insurance by any one of several steamship lines. The ship with which we are concerned in the present case was the *Golden Fleece*. The document contains a statement of the excesses to be declared, and indorsed upon it is a list of the different steamship lines in respect of which the excesses were to be reinsured. It was the duty of the assured to declare the excess in each case, but that course was not followed, with the result that a considerable interval elapsed after the document was initialled, during which there was no declaration, and it was not until after the loss had taken place that the underwriters had any information to the effect that they were liable as reinsurers. It is this interval that the underwriters complain of, and for that reason the defendant in the present case takes the course of insisting on a stamp objection, so that the plaintiffs are compelled to sue on the slip or covering note. The objection raised by the defendant is stated in the following terms in paragraph 3 of the points of defence: "There was no contract of reinsurance expressed in a policy sufficient to satisfy the requirements of the statute 54 & 55 Vict. c. 39, s. 93." An order was made at chambers that the question raised under this paragraph be tried, "and

(1) (1869) L. R. 8 Eq. 368.

(2) (1872) L. R. 7 Q. B. 304; (1874) L. R. 9 Q. B. 577.

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that, for the purposes of the trial of this preliminary question, the Court is to assume that all penalties (if any be necessary) have been paid." The question which I have to determine under this order is, whether the statement in clause 3 of the points of defence is an answer to the plaintiffs' claim, and this depends upon whether, by reason of recent legislation, the document, which has been described as a slip or a covering note, can be stamped after execution, so as to be admissible in evidence and available for the purposes of the action. The former provision as to this question was contained in 35 Geo. 3, c. 63, s. 11, which provided "that every contract or agreement which shall be made or entered into for any insurance, in respect whereof any duty is by this Act made payable, shall be engrossed, printed, or written, and shall be deemed and called a policy of insurance; and that the premium, or consideration in the nature of a premium, paid, given, or contracted for, upon such insurance, and the particular risk or adventure insured against, together with the names of the subscribers and underwriters, and sums insured, shall be respectively expressed or specified in or upon such policy, and in default thereof every such insurance shall be null and void to all intents and purposes whatever." That was followed by various other statutes in pari materiâ. At one time it was thought that provision might be made for stamping the slip (1); but that provision was found to be contrary to the course of business, and practically it came to nothing. Then 30 & 31 Vict. c. 23 (2) repealed the former statutes on the subject, and provided, by s. 7, that the contract should be expressed in a policy, and should contain certain particulars. The provisions of that statute have been the subject of much discussion, the result of which is, that it is now quite clear that the slip may be looked at for a collateral purpose: *Ionides* v. *Pacific Insurance Co.* (3); and it is equally clear that the slip is not a policy of sea insurance. The language of the Act 30 & 31 Vict. c. 23, s. 7, admits of no doubt on this point, and the

(1) 54 Geo. 3, c. 144, repealed by 33 & 34 Vict. c. 99, s. 2.

(2) Repealed by 54 & 55 Vict. c. 38, s. 28, and c. 39, s. 123.

(3) L. R. 6 Q. B. 674; L. R. 7 Q. B. 517.

cases which were decided upon it—*Cory* v. *Patton* (1), *Ionides* v. *Pacific Insurance Co.* (2), and *Fisher* v. *Liverpool Marine Insurance Co.* (3)—also shew that a slip was not a policy, within the meaning of that statute. Then the Sea Insurance (Stamping of Policies) Amendment Act, 1876 (39 & 40 Vict. c. 6), by s. 2 (4), for the first time permitted a stamp objection to be got over in the case of a policy of sea insurance, by stamping after execution, on payment of a penalty; but it was not the slip which by that Act was allowed to be stamped, but "a policy of sea insurance." The language of that Act is precise, and there is no intimation whatever of any intention that any other document than a policy of sea insurance was to be placed in a similar position with regard to stamping after execution. Next comes the Stamp Act, 1891 (54 & 55 Vict. c. 39), which by s. 95, sub-s. 2, re-enacts the provisions of the repealed Act of 1876, in the following words: "Provided that a policy of sea insurance shall, for the purpose of production in evidence, be an instrument which may legally be stamped after the execution thereof, and the penalty payable by law on stamping the same shall be the sum of 100*l*." The contract for sea insurance which is valid and enforceable under that Act must, by s. 93, sub-s. 1, be expressed in a policy of sea insurance. This document, which is relied on by the plaintiffs, is an instrument purporting to cover risks which are not disclosed, but when its terms are examined, it is nothing more than an ordinary slip, and it is not possible to contend with success, in the face of the terms of the statute, that it is to be treated as a policy of sea insurance. Those who are concerned in the preparation of such documents as this, and who contemplate treating them as policies, may possibly find themselves in a very awkward position, having regard to the provisions of s. 97, imposing penalties for insuring without a duly stamped policy. It is contended further that this document is a contract to issue a policy of sea insurance, and is enforceable as such; but, for

(1) L. R. 7 Q. B. 304; L. R. 9 Q. B. 577.

(2) L. R. 6 Q. B. 674; L. R. 7 Q. B. 517.

(3) L. R. 8 Q. B. 469; L. R. 9 Q. B. 418.

(4) Repealed by 54 & 55 Vict. c. 39, s. 123.

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the reasons which I have given, I have come to the conclusion that it is a contract of sea insurance, which by the terms of the statute is not enforceable. It is only binding in honour. The result is that my judgment must be in favour of the defendant, but as the objection which has been raised is one entirely without merits, the judgment will be without costs.

*Judgment for the defendant.*

Solicitors for plaintiffs: *Tippetts & Son.*
Solicitor for defendant: *James Ballantyne.*

P. B. H.

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C. A.

1898

*March* 28.

[IN THE COURT OF APPEAL.]

## THE QUEEN *v.* LEIGH RURAL DISTRICT COUNCIL.

*Local Government—Rate—Rural District Council—Special Expenses—Retrospective rate—Delay in Commencement of Action—Mandamus to enforce Judgment—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 210, 229, 230.

The defendants, a rural district council, in 1895 incurred a debt to an urban district council in respect of water supply for a contributory place within their district. The defendants refused to pay the debt, setting up a cross-claim against the urban district council for damages for breach of agreement to a greater amount. In respect of these conflicting claims a prolonged correspondence and negotiation took place between the two councils; but, ultimately, the urban district council brought an action for their debt in March, 1897, and on May 15, 1897, the amount actually payable to them was ascertained by judgment being recovered by them for a balance of their debt above the sum recovered by the defendants on their counter-claim. On October 25 in the same year the urban district council applied for a mandamus commanding the defendants to issue their precept to the overseers of the contributory place for payment of the amount recovered:—

*Held*, that, the delay in the commencement of the action being under the circumstances excusable, the mandamus ought to issue and that the rate which would thereupon have to be made would not be illegal as being retrospective.

*Waddington* v. *City of London Union*, (1858) E. B. & E. 370, and *Worthington* v. *Hulton*, (1865) L. R. 1 Q. B. 63, discussed.

APPEAL from the order of a Divisional Court (Day and Lawrance JJ.) for the issue of a writ of mandamus to the

defendants, the Leigh Rural District Council, as after mentioned.

An agreement was in January, 1893, entered into between the defendants and the Tyldesley Urban District Council, the prosecutors, whereby the latter were to supply water to the defendants for the use of a contributory place within their district. The defendants were by the agreement to take a minimum quantity of 75,000 gallons a week on payment of a specified annual sum, and were to be at liberty to require an extra quantity of water on payment of a further charge. Under the agreement the prosecutors were to provide a meter to measure the amount of water supplied, and to keep the same in repair. A supply of water was provided by the prosecutors under the agreement, and continued till May 6, 1895. It was then discovered that the meter which the prosecutors had provided was out of order, and had been registering much less than the amount of water which had actually been supplied. It was also discovered that there was a leak in the defendants' pipes through which water, after it had passed through the meter, had been running to waste. The prosecutors thereupon claimed payment for extra water which had in fact passed through the meter; but the defendants declined to pay the amount claimed, demanding damages to a larger amount per contra for breach of the agreement to provide a meter, on the ground that, if the meter had been in proper order, they would have discovered that the water was running to waste. A considerable amount of time was consumed in correspondence and negotiation on the subject, and, no settlement being arrived at, on March 9, 1897, the prosecutors commenced an action against the defendants to recover 93*l.* for extra water supplied. The defendants admitted the claim but counter-claimed in the action 104*l.* damages for breach of the agreement to provide a proper meter. The prosecutors paid 30*l.* into court on the counter-claim, and ultimately on May 15, 1897, judgment was signed by consent for them for the balance of 63*l.* This amount not being paid, on October 25, 1897, the prosecutors applied for and obtained a rule nisi for a mandamus to the defendants to issue their precept to the overseers of the contributory place requiring

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them to pay the amount of the judgment, and upon the argument of the rule on January 18, 1898, the Divisional Court made the order absolute for the mandamus.

*Macmorran, Q.C.*, and *H. Tindal Atkinson*, for the defendants. The mandamus ought not to have been granted, because it will involve the making of a retrospective rate, which is illegal. The original cause of action in this case had accrued on May 6, 1895; and therefore, when the prosecutors commenced the action in which the judgment was obtained, a rate could not have been made to satisfy the claim, because such a rate would have been retrospective to the extent of nearly two years. The defendants cannot by submitting to judgment in an action obtain power to charge this liability on the ratepayers which they would not otherwise have had. The liability in question comes within the "special expenses" provided for by s. 229 of the Public Health Act, 1875; and by s. 230, for the purpose of obtaining payment of such an expense, the rural authority have to issue their precept to the overseers of the contributory place in respect of which it has been incurred, requiring them to pay it; and, thereupon, the overseers are to raise the requisite amount by levying a separate rate, which, with certain exceptions not material to the present purpose, is "as respects the power of the overseers in relation to making, assessing, and levying such rate, and as respects the appeal against such rate, and all other incidents thereof, except the purposes to which it is applicable," to be "subject to the same provisions as apply in law to a rate levied for the relief of the poor." There is no provision with regard to rural authorities such as that of s. 210, by which urban authorities are given the power of making rates retrospectively to meet expenses incurred at any time within six months before the making of the rate. Therefore the rate under s. 230 stands on precisely the same footing as a poor-rate in this respect; and a poor-rate must be made prospectively: *Waddington* v. *City of London Union*. (1) The defendants cannot by reason of the judgment obtain authority to raise funds for payment of the debt which they

(1) E. B. & E. 370.

could not otherwise legally raise, because it would involve a retrospective rate. If the judgment had that effect, the rule against retrospective rates might be evaded to any extent: *Burland* v. *Hull Local Board* (1); *Saul* v. *Wigton Rural Sanitary Authority* (2); *Reg.* v. *Bedlington Overseers* (3); *Reg.* v. *Rotherham Local Board.* (4) In *Worthington* v. *Hulton* (5) it was held with reference to s. 89 of the Public Health Act, 1848 (11 & 12 Vict. c. 63), which corresponds to s. 210 of the Public Health Act, 1875, that, where judgment was recovered against an urban authority in an action commenced after the expiration of six months from the accrual of the right of action, and a mandamus was sued out within six months to enforce the judgment, the Court might grant the mandamus, if sufficient cause were shewn to excuse the delay in commencing the action. It is difficult to understand the exact principle upon which that decision proceeded, but it had relation to the enactment which gave power to an urban authority to make rates retrospectively to the extent of six months, and has no application to the case of a rural authority which has not that power.

*McCall, Q.C.*, and *Horridge*, for the prosecutors. There is no general principle of law against a retrospective rate. The question whether a rate can be made retrospectively depends in each case upon the purview and provisions of the particular statute under which the rate is made: *Harrison* v. *Stickney.* (6) The poor-rate depends upon the statute 43 Eliz. c. 2, and is intended to provide for poor law expenses, which involve different considerations from those applicable to the special expenses of a rural sanitary authority. If the defendants were an urban council, upon the authority of *Worthington* v. *Hulton* (5), the prosecutors would be entitled to succeed, because there was abundant excuse for the delay in commencing the action, there being complicated matters in dispute between the parties, and cross-claims with regard to which long correspondence and negotiation took place. It is submitted that, though that decision was upon a section analogous to s. 210, the

(1) (1862) 3 B. & S. 271.
(2) (1887) 56 L. T. 438.
(3) (1884) 48 J. P. 486.
(4) (1858) 8 E. & B. 906.
(5) L. R. 1 Q. B. 63.
(6) (1848) 2 H. L. C. 108.

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principle of it applies to the present case, s. 230 containing no express limit of time with regard to the making of the rate. Sect. 230 says that "a separate rate under this section shall as respects . . . . all other incidents thereof, except the purposes to which it is applicable" be subject to the same provisions as apply in law to a poor-rate. Therefore the question how far a rate may be made for retrospective purposes under that section must depend on a consideration of the purposes of the Public Health Act, not of the Poor Law Acts. The judgment merges the original debt and creates a new liability. It is submitted that the effect of the decision in *Worthington* v. *Hulton* (1) is that, where a judgment has been obtained, there is no question of the rate being retrospective. It is a matter for the discretion of the Court whether a mandamus shall go to make a rate to satisfy the judgment, and the way in which the Court will exercise that discretion depends upon whether the circumstances shew a sufficient excuse for the delay in bringing the action. If the Court sees that they do, then it has a discretion to issue the mandamus. If the law were otherwise, it would practically be unworkable in relation to cases where a liability is disputed or is doubtful in amount. Suppose an action for damages is brought against a rural authority in respect of injuries occasioned by the negligence of one of their servants, acting within the scope of his employment, and judgment is recovered against them. It cannot be that no mandamus could go to make a rate to pay such damages on the ground that the rate would be bad because made retrospectively. In this case there never was an ascertained balance due until the judgment was signed: that was upon May 15, 1897, and the mandamus was applied for in the same poor law year, namely, in October, 1897. The only authority against the prosecutors is what was said by Watson B. in delivering the judgment in *Waddington* v. *City of London Union*. (2) But there had not been any judgment recovered in that case, and therefore what he there said was entirely obiter.

*H. Tindal Atkinson*, in reply. Sect. 230 impliedly, if not expressly, forbids a retrospective rate. It is impossible to

(1) L. R. 1 Q. B. 63. (2) E. B. & E. 370, at p. 405.

suppose that the Legislature, which had limited the extent to which an urban authority might make a retrospective rate to six months, intended to leave a rural authority absolutely unfettered in that respect. The debt in this case was due on May 6, 1895. The fact that there was a dispute and the defendants counter-claimed did not make it the less a debt. The obtaining of a judgment cannot have the effect suggested by the prosecutors. If it had, the law which prohibits retrospective rates could be evaded in all cases, and the ratepayers would have no protection at all. The authority, if willing to pay the debt, might always submit to judgment, and then levy a rate in order to satisfy the judgment without being compelled to do so by mandamus.

A. L. SMITH L.J. This is an appeal against the judgment of a Divisional Court making absolute a rule for a mandamus to the defendants to issue their precept for payment of the amount of a judgment recovered against them. The question is whether, there being a debt justly due to the prosecutors from the defendants for which judgment has been recovered, and the defendants refusing to issue their precept for the purpose of getting funds to meet that debt, and a mandamus to compel them to do so not having been applied for within the rating year in which the debt was originally incurred, the necessary result is that no such mandamus can issue, and the prosecutors must go without payment of their debt. In my opinion it would be clearly wrong under the circumstances of this case that the answer should be in the affirmative.

In this case the prosecutors, the Tyldesley Urban District Council, agreed to supply water to the defendants, the Leigh Rural District Council, at a certain rate, and did supply water to them between July, 1893, and May, 1895.

On May 6, 1895, it appeared that the meter, which by the agreement was to be provided and kept in order by the prosecutors, was out of order, and had been registering much less water than had actually been supplied, and it was also discovered that the pipes which belonged to the defendants were likewise out of order, there being a leakage in them; and

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thereupon a discussion arose between the two councils as to the amount of water supplied, and they respectively made claims the one against the other. This occupied a considerable time, and on March 9, 1897, the matters in dispute not having been adjusted between them, and neither party knowing how the account between them stood, an action was brought by the prosecutors in order to get the dispute determined. The action took its course, and the plaintiffs claimed in it the sum of 93*l.*, and the defendants counter-claimed 104*l.* In the result the defendants submitted to the plaintiffs' claim of 93*l.*, and the counter-claim was cut down to 30*l.*; and judgment was signed on May 15 by consent for the plaintiffs for the balance of 63*l.* The amount really due and payable by one party to the other was not in truth ascertained until the judgment was so signed. The defendants refusing to issue their precept for the purpose of providing themselves with funds to meet the judgment, a rule nisi for a mandamus to compel them to do so was moved for on behalf of the prosecutors on October 25, 1897, and was granted, and the rule was made absolute on January 18 in this year. The defendants appeal. The contention for the defendants is that the mandamus cannot be issued, because it would involve the making of a rate which would be retrospective, inasmuch as it would be levied in respect of a debt which was due as long ago as May 6, 1895. But, as I have already pointed out, the amount really due was not ascertained, there being a claim on one side and a counter-claim on the other, until the judgment in the action was signed. I think that, the mandamus being applied for in the same rating year in which the amount of the debt really due was first ascertained by the judgment, there is no objection to the rate on the ground of its being retrospective. That, in my opinion, is really a sufficient ground upon which to decide this case. Several authorities were referred to during the argument, upon the strength of which it was contended for the defendants that, if we allowed the mandamus to issue, we should be in effect ordering a retrospective rate to be made, which we had no power to do. It was said that s. 210 of the Public Health Act, 1875, does not apply to rural district councils, which is true, and therefore

that the cases decided with reference to a provision in the Public Health Act of 1848 corresponding to that section have nothing to do with this case, which depends wholly on ss. 229 and 230 of the Public Health Act, 1875. Sect. 229 provides with regard to the expenses of a rural authority that "special expenses" shall be a separate charge on each contributory place, and s. 230 provides that for the purpose of obtaining payment of such expenses the rural authority shall issue their precept to the overseers of the contributory place, and the overseers shall raise the contribution required by the levy of a separate rate, which shall, as respects the power of the overseers in relation to making, assessing, and levying such rate, and as respects the appeal against such rate, and all other incidents thereof, except the purposes to which it is applicable, be subject to the same provisions as apply in law to a rate levied for relief of the poor. It was urged for the defendants that a poor-rate can only be levied in respect of charges incurred within the rating year, for which no doubt there is a considerable amount of authority. I feel some doubt whether the same considerations which are applicable to a rate for expenses for the relief of the poor which may be estimated prospectively apply to a rate for these special expenses under the Public Health Act. But be that as it may, I am of opinion, on looking at the authorities cited, that there is no absolute rule of law laid down by them compelling us to hold that a rate for special expenses under such circumstances as exist in the present case must necessarily be illegal unless made within the rating year in which the expenses were incurred. It is true that Watson B., in delivering the judgment of the Exchequer Chamber in *Waddington* v. *City of London Union* (1), did say that in that case, if there had been a judgment against the guardians, the Court could not have granted a mandamus to make a rate, because it had no power to order the making of an illegal rate. But he was there dealing with the case of a poor-rate pure and simple, and the passage does not appear to me to be necessary to the decision. I do not think that in that case the Exchequer Chamber can be considered as having decided that under the

(1) E. B. & E. 370, at p. 405.

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circumstances which exist in the present case the mandamus cannot be granted. The next authority mainly relied upon was *Burland* v. *Hull Local Board of Health* (1), to which I need not allude further than by passing on to what was said about it in *Worthington* v. *Hulton* (2) by Mellor J., who delivered the judgment of the Queen's Bench in that case, to which Cockburn C.J., one of the judges who decided *Burland* v. *Hull Local Board of Health* (1), was a party. He there says that "all that was necessary for the decision of the case, and all that can be considered as really decided by it, was that a plaintiff could not claim as of right a mandamus to enforce a judgment where there was great and unexcused delay in commencing the original action." I think that the result of what was said in *Worthington* v. *Hulton* (2) is to shew that the Court came to the conclusion that there was no hard and fast rule applicable in all cases to the effect that the Court could not grant the mandamus to make a rate unless moved for within the rating year in which the expenses were incurred, but that they might grant it where there was a sufficient excuse for the delay in commencing the action. I am of opinion that in the present case, the amount really due from the defendants being unascertained and in dispute until the judgment was signed, the prosecutors had a sufficient cause for not moving earlier, and that the mandamus was therefore rightly granted. For these reasons I am of opinion that the appeal should be dismissed.

COLLINS L.J. I am of the same opinion. I do not think that there is any principle of law or decided case which debars us from doing what seems to me to be justice in this case. It is true that the cause of action had in one sense accrued in May, 1895, but, though technically that was so, it was in fact then asserted by the defendants that they had a counter-claim, which exceeded the amount of the claim made by the prosecutors; and it was not until May, 1897, after a long correspondence in which the parties formulated their respective contentions as to their rights in the matter, that the amount which had actually to be paid by the defendants was ultimately

(1) 3 B. & S. 271. (2) L. R. 1 Q. B. 63.

ascertained by the judgment for 63*l.* which was then signed by consent. In such a case not only is the judgment technically a fresh debt, but substantially it is only at the date of it that the real debt due is ascertained. I think that our decision in this case might be rested on the ground that, practically and as a matter of business, the rights of the parties only ripened into an ascertained liability when they were fixed by the judgment, and therefore for the present purpose there is no reason for going behind the judgment; and, that being so, and the application for the mandamus being made within the rating year in which the judgment was recovered, it ought to be granted. But, apart from that ground, I do not myself think that we are bound by authority to hold that, where a cause of action has accrued, and, without unreasonable delay in prosecuting it, judgment is not arrived at until after the end of the rating year in which it accrued, it then necessarily becomes impossible to make a rate for the purpose of meeting the judgment, because such a rate would be retrospective. I do not think that there is any principle or authority which compels us to hold this to be so. Upon examination of the authority chiefly relied upon for that purpose—namely, *Waddington* v. *City of London Union* (1)—it appears, no doubt, that Watson B. in delivering the judgment of the Exchequer Chamber in that case did suggest that, even if there had been a judgment in that case, the Court could not have granted a mandamus to make a rate because such a rate would have been illegal, but it is obvious that that is merely a dictum, because there was no question of any judgment in that case, and it was therefore not necessary to decide the point; and furthermore in that case the facts were such that on any application for a mandamus there would have been a discretion to refuse it. I do not think that the case can be looked upon as a decision that the mere fact that the rights of the parties have not been ascertained by judgment until after the end of the rating year in which the original liability accrued necessarily makes a rate for the purpose of meeting the judgment illegal as being retrospective. That being so, we are thrown back on the broad principle laid down in

(1) E. B. & E. 370.

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*Harrison* v. *Stickney* (1), to the effect that there is no general rule of law against a retrospective rate, and one must look in each case to the particular statute under which the rate is levied. I do not think that there is any prohibition either express or implied under the statute now in question against a rate to provide for a liability which has only ripened into a judgment after the end of the year in which the liability accrued. In such a case the Court would have a discretion as to enforcing the making of a rate by mandamus, and, if there were no sufficient excuse for the delay, they might refuse to do so. The cases decided upon the section of the Public Health Act, 1848, corresponding with s. 210 of the Public Health Act, 1875, appear to me to have a two-fold bearing on this question. First they shew that the judgment is a new point of departure which may be looked to in determining whether a rate is retrospective, and secondly that, where the delay in commencing the action can be satisfactorily explained, the Court may exercise its discretion as to granting a mandamus in favour of the party who has so delayed, although six months have elapsed since the accruing of the cause of action. Dealing with the present case as a matter of discretion, it appears to me that the prosecutors had abundant ground for delaying as they did, and that it would have been indiscreet under the circumstances to commence the action forthwith. For these reasons I think that there is nothing to debar the Court from doing what the justice of the case requires, and that the appeal must be dismissed.

*Appeal dismissed.*

Solicitor for prosecutors: *C. W. Saffell, for W. Holland Owen, Liverpool.*

Solicitors for defendants: *Robbins, Billing & Co., for Marsh, Son & Calvert, Leigh.*

(1) 2 H. L. C. 108.

E. L.

## LODGE, Appellant *v.* HUDDERSFIELD CORPORATION, Respondents.

1898
*March* 31;
*April* 1.

*Local Government — Street — Footway — Main Road — County Borough — Frontagers—Local Act—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 11.

A local Act passed in 1871 gave power to the corporation of a municipal borough to order that in any street (whether or not a highway repairable by the inhabitants at large) footways should be made by the frontagers of such form, size, and materials as the corporation should direct, and provided that if the frontagers made default in the execution of the work the corporation might cause the work to be executed and recover the expense incurred in respect thereof from the frontagers:—

*Held*, that where the municipal borough had by virtue of the Local Government Act, 1888, become a county borough, the provisions of s. 11 of that Act had not the effect of repealing the provisions of the local Act as regards streets which were main roads within the meaning of the Highways and Locomotives (Amendment) Act, 1878.

Case stated for the opinion of the Court under 12 & 13 Vict. c. 45, s. 11.

Huddersfield is a municipal borough incorporated on July 7, 1868, and, being one of the boroughs named in the 3rd schedule of the Local Government Act, 1888, is now a county borough.

The appellant was on October 16, 1895, and still is, the owner within the meaning of the Huddersfield Improvement Act, 1871, hereinafter referred to, of certain lands abutting upon a certain street within the said borough hereinafter called "Woodhead Road."

Woodhead Road was formerly a turnpike road constructed under the provisions of an Act, passed in the eighth year of the reign of Geo. 3, for diverting, altering, widening, repairing, and amending the road from Huddersfield, in the West Riding of the county of York, to Woodhead, in the County Palatine of Chester, &c.

By s. 13 of the Huddersfield Improvement Act, 1871 (34 & 35 Vict. c. cli.), it was provided that the management of all streets and courts which, at the commencement of that Act, were or should thereafter become public highways, and

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the pavements and other materials as well in the footways as in the carriage-ways of such streets and courts, should belong to the corporation; and by s. 14 of the same Act it was provided that the corporation exclusively should be the surveyors of highways, and, subject to the provisions of that Act, should have all such powers and authorities, and be subject to all such liabilities, as any surveyors of highways were invested with or subject to by virtue of the laws for the time being in force.

In pursuance of the Annual Turnpike Acts Continuance Act, 1874 (37 & 38 Vict. c. 95), Woodhead Road on November 1, 1875, ceased to be a turnpike road.

By s. 13 of the Highways and Locomotives (Amendment) Act, 1878, Woodhead Road became a main road, and one-half of the expenses incurred by the respondents in maintaining the said road became and was (until the said borough became a county borough by virtue of the Local Government Act, 1888) payable by the county authority for the West Riding of the county of York.

In the year 1870 the trustees of the said turnpike road caused the footway in front of and abutting upon the property now owned by the appellant to be asphalted and edged with stone.

After the year 1875, and before the year 1895, the respondents repaired the said footway by placing ashes on it.

The respondents on October 16, 1895, in pursuance of s. 53 of the Huddersfield Improvement Act, 1871, resolved and ordered that all the owners of the buildings or lands abutting on the west side of Woodhead Road, on which side there was not then in the opinion of the respondents a properly paved, flagged, or asphalted footway, should within a specified time make a footway on that side of the road in the manner described in such order. The appellant was and is the owner of all the buildings and lands abutting on the west side of Woodhead Road referred to in the said order of October 16, 1895; and after due service of the said order the appellant made default in complying therewith, and the respondents made the said footway and works prescribed by the said order, and incurred expenses to the amount of 65*l.* 0*s.* 5*d.* in respect thereof. The said amount was duly apportioned by the surveyor of the respondents under

and in accordance with s. 43 of the said Huddersfield Improvement Act, 1871, and by the respondents under and in accordance with s. 76 of the Huddersfield Waterworks and Improvement Act, 1876, as payable by the appellant. The said apportionment was not disputed by the appellant after due notice thereof, and due demand was made upon him for payment thereof, but he refused to pay the same.

On June 23, 1897, the appellant, in pursuance of s. 308 of the said Huddersfield Improvement Act, 1871, was duly summoned to appear on July 2, 1897, before a court of summary jurisdiction holden at Huddersfield, in the county of York, to shew cause why a distress warrant should not be issued for sale of the goods and chattels of the appellant for the recovery of the said sum of 65*l.* 0*s.* 5*d.*; and, upon the hearing of the said summons, the justices at the said court of summary jurisdiction issued a distress warrant for the said sum against the goods and chattels of the appellant.

The appellant duly appealed to the quarter sessions holden at Wakefield for the West Riding of the county of York on October 18, 1897, against the issue of the said distress warrant, and, upon the said appeal coming on for hearing, it was agreed between the parties that the said appeal should be respited, and that this case should be stated for the opinion of this honourable Court.

The questions for the opinion of the Court were whether the provisions of s. 53 of the Huddersfield Improvement Act, 1871, had been repealed or superseded either by the provisions of the Public Health Act, 1875, or by the provisions of the Local Government Act, 1888; and whether the respondents were entitled to charge the appellant with the expenses incurred by them in making the said footway.

*Tindal Atkinson, Q.C.* (*W. J. Waugh* with him), for the appellant. There was no jurisdiction to make this order. Sect. 53 of the Huddersfield Improvement Act, 1871 (1) is in

(1) By the Huddersfield Improvement Act, 1871 (34 & 35 Vict. c. cli.), s. 53, "If at any time in any street (whether or not a highway repairable by the inhabitants at large) there is not a properly paved, asphalted, or

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different terms to s. 20 of the Ashton-under-Lyne Improvement Act, 1849, and therefore, notwithstanding the decision in *Ashton-under-Lyne Corporation* v. *Pugh* (1), s. 53 must be taken to have been repealed by s. 149 of the Public Health Act, 1875. But, even if it should be held that the decision in *Ashton-under-Lyne Corporation* v. *Pugh* (1) disposes of this contention, Huddersfield is a county borough, and, therefore, the provisions of s. 11 of the Local Government Act, 1888, apply to main roads within it such as the road in question. Sect. 11 says that the main roads must be wholly repaired by the county council, and therefore its provisions are incompatible with those of s. 53 of the Huddersfield Improvement Act, 1871. The latter section

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flagged footway on each side, the corporation may at any time and from time to time, and as to one side or footway after the other in succession, or as to both sides or footways, order the owners or occupiers of buildings or lands in the street to make a footway or footways in the street along their respective frontages thereto of such form, size, and materials, at such levels, with such inclinations, in such manner and within such time as the corporation direct; and thereupon such owners shall, at their own expense, make such footway or footways, and otherwise proceed as prescribed in the order; and if any work required to be done by any such order is not commenced within one month after service of such order, or if any such work when commenced is not carried on with reasonable despatch, or is not carried on in the manner or completed within the time prescribed in the order, the corporation may, at any time and from time to time, make and execute the footway or footways and works prescribed by the order, and may charge and recover the expenses incurred, and commission, thereon as new street expenses. . . . ."

By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149, "All streets being, or which at any time become, highways repairable by the inhabitants at large within any urban district, and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority. The urban authority shall from time to time cause all such streets to be levelled, paved, metalled, flagged, channelled, altered, and repaired as occasion may require."

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11, "Every road in a county which is for the time being a main road within the meaning of the Highways and Locomotives (Amendment) Act, 1878 . . . . shall . . . . be wholly maintained and repaired by the council of the county in which the road is situate, and such council, for the purpose of the maintenance, repair, improvement, and enlargement of and other dealing with such road, shall have the same powers and be subject to the same duties as a highway board . . . ."

(1) Ante, p. 45.

must, therefore, be taken as repealed by the Local Government Act, 1888. But, even if s. 53 is not affected by either the Public Health Act, 1875, or the Local Government Act, 1888, there was no jurisdiction under the circumstances to make this order on the appellant. (1)

*Macmorran, Q.C.* (*Alexander Glen* with him), for the respondents. Sect. 53 of the Huddersfield Improvement Act, 1871, has not been repealed either by the Public Health Act, 1875, or by the Local Government Act, 1888. The Public Health Acts were excluded by s. 5 of the Huddersfield Improvement Act, 1871, and by s. 313 of the Public Health Act, 1875, where in any local Act the former Public Health Acts are referred to the Act shall be read as if it referred to the Public Health Act, 1875. That Act, therefore, has no operation on the Huddersfield Improvement Act, 1871. Nor is s. 53 repealed by the Local Government Act, 1888. That Act did not alter the position of the corporation with regard to this road, and by s. 97 the liability of persons not being highway authorities to maintain and repair roads or parts of roads was expressly preserved with respect to main roads. Besides, s. 11 of the Local Government Act, 1888, like s. 149 of the Public Health Act, 1875, does not decide the question on whom the expenses of repair shall fall, but merely fixes the authority who is responsible for the condition of the roads. The decision in *Ashton-under-Lyne Corporation* v. *Pugh* (2) is, therefore, in point.

*Tindal Atkinson, Q.C.*, replied.

*Cur. adv. vult.*

April 1. The judgment of the Court (Lord Russell of Killowen C.J. and Mathew J.) was delivered by

LORD RUSSELL of KILLOWEN C.J. In this case the question is whether the appellant, as owner of adjoining land—as frontager, as it is called—is liable to maintain a footpath or section of a footpath conterminous with his frontage in

(1) For the purposes of this report it is not necessary to set out the arguments and decision on this question, which turned entirely on the special facts and the provisions of the local Act.

(2) Ante, p. 45.

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Lord Russell C.J.

Woodhead Road, which is a main road or street in the county borough of Huddersfield.

The material facts to be borne in mind in considering the question are these: Woodhead Road was formerly a turnpike road, and while a turnpike road the trustees in 1870 made a footpath along the line of frontage conterminous with the land of the present appellant; and that footpath is described in the case as one which was thus constructed by the trustees: "In the year 1870 the trustees of the said turnpike road caused the footway in front of and abutting upon the property now owned by the appellant to be asphalted and edged with stone"; so that it was an existing and completed footpath at that time. In 1875 the road ceased to be a turnpike road, and by the Act of 1878 it became a main road, and at that time and thereafter the expense of maintaining the road (which expense applies not merely to the main body of the road, but, according to the authorities, also to the footpaths on one or both sides of the road) became a charge upon the county in part, and upon the municipality of Huddersfield in part, the Huddersfield authority doing the work of keeping the main road in repair and getting a contribution of half the expenses from the county authority. Between 1875 and 1895 repairs were done to that road and to the footpath of that road by the borough authority, and there is no allegation in the case, and no ground we must assume for alleging, that during that time any claim was made upon any frontager in respect of that footpath for any repairs that required to be done. We must assume that all such repairs were done by the borough authority, the expenses being shared, as I have said, by the county authority.

In 1888 came the Local Government Act, and, under the operation of that Act, Huddersfield became a county borough, and thereupon, under the scheme contemplated by that Act, the liability for maintaining, amongst others, this particular road, became the liability of the county borough and of the county borough alone. I am not using the expression of "the county borough and of the county borough alone" as meaning to exclude the consideration of whether ultimately the burden

might be shifted on to the frontagers, but as between the county authority and the county borough authority.

Now I come to the point in question. The county borough authority made the order of October 16, 1895, upon which this question turns, namely, whether it was an order which it was competent to that county borough authority to make. I have to observe in relation to the order that it does not reveal on the face of it what its real object and purport were. To read it as it is, taking it literally, it would convey the idea that there was no existing footway, and that it was an order to make a footway. We know that it was not so, but that it was intended to be and was an order, not to make a footway (for a footway had been existing, as I have pointed out, from the year 1870), but to repair and modernise the existing footway. The real question in this case is, Was that an order which it was competent for the county borough authority to make? Was it competent for them, in other words, to make an order in the facts of this case on the appellant as frontager to repair, or pay the cost of repairing and keeping in repair, the footpath in question?

The order purported to be made under s. 53 of the Huddersfield Improvement Act, 1871. The appellant raised two questions. First, he said that that section had no longer any operative force because it was repealed by the Public Health Act, 1875, or, if not repealed by the Act of 1875, it was repealed by the Local Government Act, 1888; and, secondly, he contended that, even if that section was not repealed, there was no jurisdiction under it to make this order in the particular circumstances. As to the first contention, with regard to the Act of 1875 it is enough to say that we think the case of *Ashton-under-Lyne Corporation* v. *Pugh* (1), which was referred to in the argument, is conclusive against that contention. I do not think the counsel for the appellant seriously disputed that view. As regards the Local Government Act, 1888, in our judgment there is no essential difference, for the distinction of this case, between the provisions of the Public Health Act and the provisions of that Act.

(1) Ante, p. 45.

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Lord Russell C.J.

We think that the true effect to be given to the provisions of s. 11 of the Local Government Act, 1888, is that it determines the question of the liability for the repair of roads as between the two authorities, the county and borough authority, but that it leaves untouched the question of whether or not the authority upon whom the burden ultimately rests may be or may not be in a position to call on the conterminous owners—the frontagers—to contribute to the expenses of doing the work in question. In our judgment, therefore, s. 53 of the Huddersfield Improvement Act, 1871, is not repealed either by the Act of 1875 or by the Act of 1888.

[His Lordship then proceeded to consider the effect of s. 53 of the Huddersfield Improvement Act, 1871, and the facts of the case, and came to the conclusion that there was no jurisdiction under that section to make the order in question. He therefore gave judgment for the appellant.]

*Judgment for the appellant.*

Solicitors for appellant: *Ramsden, Sykes & Ramsden, Huddersfield.*

Solicitors for respondents: *Riddell, Vaizey & Co., for F. C. Lloyd, Town Clerk, Huddersfield.*

A. P. P. K.

## LANCASTER *v.* BARNES DISTRICT COUNCIL.

1898
*April* 22.

*Local Government—Public Health—Nuisance—Several Houses Drained by Single Private Drain—Joint Notice to Several Owners to Repair—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 41—*Public Health Act*, 1890 (53 *&* 54 *Vict. c.* 59), *s.* 19.

Five houses, of which three belonged to one owner and two to another, were connected with the public sewer by a single private drain. The drain being a nuisance and injurious to health, the local authority served on each of the two owners a notice, under s. 41 of the Public Health Act, 1875, and s. 19 of the Public Health Act, 1890, addressed to them jointly, requiring them to relay the whole of the drain :—

*Held*, that the fact that neither of the owners could relay the part of the drain situate in the other's premises without committing a trespass was no objection to the validity of the notice, and that on non-compliance with the notice the local authority might execute the work and recover the expenses from the owners under the last-mentioned section.

CASE stated by justices for the county of Surrey.

The appellant Thomas Lancaster was the owner of three houses, Nos. 8, 9 and 10, Park Terrace, Upper Richmond, within the respondents' district, and one A. R. Barker was the owner of the adjoining houses, Nos. 6 and 7, in the same terrace. All the said five houses were connected with the public sewer by means of a single private drain situate at the rear of the houses, commencing with No. 10 and running towards No. 6. In March, 1897, a nuisance injurious to health was caused by a stoppage of the drain, and complaint thereof having been made to the respondents, they directed their surveyor to enter and examine the drain. As upon examination the drain appeared to be in a bad condition and to require amendment, the respondents served upon the appellant a notice under s. 41 of the Public Health Act, 1875, and s. 19 of the Public Health Act, 1890 (1), addressed jointly to "Thomas Lancaster and

(1) By s. 19 of the Public Health Act, 1890, "Where two or more houses belonging to different owners are connected with a public sewer by a single private drain, an application may be made under s. 41 of the Public Health Act, 1875 (relating to complaints as to nuisances from drains), and the local authority may recover any expenses incurred by them in executing any works under the powers conferred on them by that section from

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A. R. Barker, owners of Nos. 6, 7, 8, 9 and 10, Park Terrace," requiring them to relay the drain with an intercepting trap at No. 3, Park Terrace, and to place a ventilator at the head of the drain at No. 10, with proper connections to each of the five houses. Default having been made in complying with the terms of the notice, the respondents repaired and cleansed the drain, and subsequently, upon complaint made before the justices, claimed to recover from the appellant his apportioned share of the expenses incurred by them in so doing. It was contended on behalf of the appellant (inter alia) that, inasmuch as the notice directed him to do works in part upon premises of which he was not the owner and occupier, and upon which therefore he could not enter without committing a trespass, and default in compliance with which rendered him liable to penalties, it was bad in law, and all subsequent proceedings based upon it were illegal. The justices overruled the contention, and ordered the appellant to pay the amount apportioned upon him, subject to a case for the opinion of the Court.

*Courthope Munroe*, for the appellant. The notice being addressed to the appellant and Barker jointly, requiring each to repair the whole drain including the portions situated in the other's premises, was bad. An order directing the abatement of a nuisance is bad if it prescribes an act the execution of

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the owners of the houses in such shares and proportions as shall be settled by their surveyor, or (in case of dispute) by a court of summary jurisdiction."

By s. 41 of the Public Health Act, 1875, "On the written application of any person to a local authority stating that any drain . . . . is a nuisance or injurious to health . . . . the local authority may by writing empower their surveyor . . . . to enter . . . . and examine such drain. . . . . If the drain . . . . on examination appear to be in bad condition . . . . the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring him . . . . to do the necessary works; and if such notice is not complied with, the person to whom it is given shall be liable to a penalty not exceeding ten shillings for every day during which he continues to make default; and the local authority may if they think fit execute such works, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses."

which involves the commission of a trespass: *Mayor of Scarborough* v. *Rural Sanitary Authority of Scarborough* (1); *Reg.* v. *Trimble*. (2) It cannot be intended that the owners shall be liable for penalties for not doing that which they have no legal right to do.

*Macmorran*, *Q.C.*, and *E. U. Bullen*, for the respondents. Under the Public Health Act, 1875, s. 41, the power of the local authority to give notice to an owner to repair a drain was confined to a case in which the drain drained a single house. On the owner served with a notice under that section failing to comply with it, he was liable to a penalty for each day he was in default. But s. 19 of the Public Health Act, 1890, under which the present notice was served, does not provide any penalties for non-compliance. There is therefore no hardship entailed by a joint notice. The object of the section was to provide machinery to enable the local authority to do the work themselves, and then apportion the expenses among the several owners. There is no more objection on the score of trespass to a joint notice under s. 19 than there is to a joint notice to the several frontagers in a street to sewer, channel, and pave under s. 150 of the Act of 1875. In *Parker* v. *Inge* (3), where a nuisance arose from the defective construction of a structural convenience, it was held that the justices had jurisdiction under s. 96 of the Public Health Act, 1875, to make an order upon the owner requiring him to abate the nuisance, although he could not enter upon the premises and execute the necessary works without the tenant's permission.

*Courthope Munroe*, in reply. Sect. 19 of the Act of 1890 extends to the case of a private drain draining two or more houses all the provisions of s. 41 of the earlier Act, including the provision as to penalties for non-compliance. If so, then the principle of *Parker* v. *Inge* (3) has no application. For the penalty imposed by s. 98 for non-compliance with an order under s. 96 was applicable only in the event of the defendant failing to satisfy the Court that he had used due diligence to carry out the order. And that condition an owner would

(1) (1876) 1 Ex. D. 344. (2) (1877) 36 L. T. 508.
(3) (1886) 17 Q. B. D. 584.

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satisfy if he proved that his tenant had refused him permission to enter on the premises.

WILLS J. The question is whether a local authority is entitled to serve a joint notice under s. 19 of the Public Health Act, 1890, upon the owners of several houses requiring them jointly to do the work specified in the notice, or whether a separate notice ought to be served on each owner requiring him to do the portion of the work which is to be done in his premises. At first sight, the contention that a notice cannot be valid which requires you to do a thing which may involve your going on some one else's land to do it seems reasonable. And if there were any penalty imposed for not doing it, that fact would afford a strong argument in support of that contention. But I am of opinion that no penalty is imposed for non-compliance with a notice under s. 19, and that the contention of the appellant fails. There is substantially no difference between the language of s. 19 and that of s. 150 of the Act of 1875. By the latter section, where any street is not properly sewered, levelled, paved, &c., the local authority may, "by notice addressed to the respective owners or occupiers of the premises fronting" on the street, "require them to sewer, level, pave, &c." the same. That notice is a general one: it is a notice to all the owners collectively to make up the street generally. No one ever saw a notice under s. 150 calling upon each owner to make up that part only which was opposite his own house. There would obviously be a practical difficulty in carrying out such a notice. As a matter of practice the work is never done by the owners: they always leave it to the local authority to do it for them and charge them with the expenses. There is consequently no hardship in the form of the notice being joint.

KENNEDY J. concurred.

*Case remitted to justices.* (1)

Solicitors for appellant: *Willett & Sandford.*
Solicitor for respondents: *J. E. Anderson.*

(1) The case was remitted to the justices on another point, as to whether the works done by the respondents were in fact substantially the same as the works specified in the notice.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1898
*April* 26.

## LODGE, APPELLANT *v.* MAYOR, ALDERMEN, AND BURGESSES OF HUDDERSFIELD, RESPONDENTS.

*Practice—Appeal—Case stated under Quarter Sessions Act*, 1849 (12 & 13 *Vict.* c. 45), s. 11—*The Judicature Act*, 1873 (36 & 37 *Vict.* c. 66), s. 19.

The entry of judgment in an appeal at quarter sessions in accordance with the decision of a Divisional Court on a case stated under the Quarter Sessions Act, 1849, s. 11, does not prevent an appeal against the decision to the Court of Appeal under the Judicature Act, 1873, s. 19.

*Corporation of Peterborough* v. *Wilsthorpe Overseers*, (1883) 12 Q. B. D. 1, and *Holborn Guardians* v. *Chertsey Guardians*, (1885) 15 Q. B. D. 76, followed.

APPEAL from the decision of a Divisional Court (the Lord Chief Justice of England and Mathew J.) upon a case stated on an appeal to quarter sessions under s. 11 of the Quarter Sessions Act, 1849.

The Divisional Court gave judgment upon the special case in favour of the appellant. (1) The respondents thereupon gave notice of appeal to the Court of Appeal. The appellant, after receipt of the notice, and after the appeal had been entered, applied to the next quarter sessions to enter judgment on the appeal to sessions in accordance with the decision of the Divisional Court in pursuance of the Quarter Sessions Act, 1849, s. 11, which the quarter sessions accordingly did.

*E. Tindal Atkinson, Q.C.* (*Waugh* with him), for the appellant (1), took a preliminary objection to the appeal. In this case judgment has been entered up at the quarter sessions in accordance with the decision of the Divisional Court as provided for by s. 11 of the Quarter Sessions Act, 1849, formerly known as Baines's Act, and there is no means of setting aside that judgment. The justices at quarter sessions were functi officio as soon as the sessions were over, and no subsequent sessions can

(1) The terms "appellant" and "respondents" are used throughout this report with reference to the original appeal to sessions and not the appeal to the Court of Appeal. The case in the Court below is reported ante, p. 847.

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have any jurisdiction over the appeal. This illustrates the difficulty in the way of holding that there is any appeal from the decision of a Divisional Court in cases under s. 11 of the Quarter Sessions Act, 1849. The Court of Appeal has, it is true, held in two cases that there is an appeal in such cases: see *Corporation of Peterborough* v. *Wilsthorpe Overseers* (1); *Holborn Guardians* v. *Chertsey Guardians* (2); but it is submitted that those decisions are not really consistent with what was laid down by the House of Lords in *Walsall Overseers* v. *London and North Western Ry. Co.* (3), to the effect that, where the jurisdiction of the Queen's Bench Division is consultative, there is no appeal under s. 19 of the Judicature Act, 1873. The jurisdiction of the Queen's Bench Division under the Quarter Sessions Act, 1849, is merely consultative. In *Ex parte County Council of Kent and Council of Dover* (4) this Court held that, where the jurisdiction is merely consultative, no appeal to the Court of Appeal lies. The Court will not entertain an appeal which cannot be effective, judgment having been entered up at sessions which there is no means of vacating.

*Sir R. T. Reid, Q.C.* (*Macmorran, Q.C.*, and *A. Glen* with him), for the respondents. The Court of Appeal has definitely decided that there is an appeal against the judgment of the Queen's Bench Division upon a case stated under the Quarter Sessions Act, 1849. Besides the two decisions cited by the appellant's counsel, there is the case of *Dewsbury and Heckmondwike Waterworks Board* v. *Penistone Union* (5), in which those decisions were deliberately followed. The fact that judgment has been entered up at sessions in accordance with the decision of the Divisional Court cannot possibly take away the appeal. There must be some mode of procedure by which that judgment can be set right, if the appeal is successful.

A. L. SMITH L.J. In this case upon an appeal to quarter sessions a special case was stated under s. 11 of the Quarter

(1) 12 Q. B. D. 1.
(2) 15 Q. B. D. 76.
(3) (1878) 4 App. Cas. 30.
(4) [1891] 1 Q. B. 725.
(5) (1886) 2 Times L. R. 375.

Sessions Act, 1849, and came on for argument before a Divisional Court consisting of the Lord Chief Justice and Mathew J., who decided that the appellant was right. Thereupon the appellant went to the quarter sessions, and, in pursuance of the provisions of the section, got judgment entered there in accordance with the decision of the Divisional Court. He took that step with knowledge that the respondents were appealing against that decision, and after the appeal had been entered. The case comes before us, and the preliminary objection is taken that there is no appeal from the decision of the Divisional Court. Our attention has been called to three cases, namely, *Corporation of Peterborough* v. *Wilsthorpe Overseers* (1); *Holborn Guardians* v. *Chertsey Guardians* (2); *Dewsbury and Heckmondwike Waterworks Board* v. *Penistone Union.* (3) In all those cases the point was taken that there was no appeal in such a case as this, and in the last of them this Court distinctly held that it was bound by the decisions of the Court in the two previous cases to the effect that there was such an appeal. The only point which can be relied upon to differentiate those cases from the present is that in this case judgment has been entered up at the quarter sessions. The counsel for the respondents has satisfied me that, if he is successful, there must be some way in which the judgment of the quarter sessions can be set right. Therefore I think, notwithstanding the judgment entered at quarter sessions, we have jurisdiction to hear this appeal.

CHITTY L.J. I am of the same opinion. This is an appeal from the decision of a Divisional Court upon a special case stated under the Quarter Sessions Act, 1849, in favour of the appellant. There are three decisions by this Court to the effect that, under circumstances precisely similar to those of the present case, with the exception that in none of those cases had judgment been entered up at sessions in accordance with the decision of the Divisional Court, there was an appeal. In this case, after the appeal to this Court was entered, the

(1) 12 Q. B. D. 1. (2) 15 Q. B. D. 76.
(3) 2 Times L. R. 375.

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appellant went to the sessions and got judgment entered up for him in accordance with the decision of the Divisional Court. It was argued that that circumstance distinguishes this case from the three cases cited, and consequently there can be no appeal to this Court. I will not specify what, if this appeal is successful, may be the particular method applicable for setting right the judgment entered at quarter sessions; but I think the respondents' counsel is right in saying that there must be some method available, although he has not had an opportunity of considering exactly by what mode of procedure he will be able to avail himself of our judgment, if it is in his favour. I therefore agree with the Lord Justice in thinking that under the circumstances we ought to hear the appeal.

[THE COURT then proceeded to hear the appeal on the merits, and ultimately it was dismissed. (1)]

*Appeal dismissed.*

Solicitors for appellant: *Capel Cure & Ball, for Ramsden, Sykes & Ramsden, Huddersfield.*

Solicitors for respondents: *Riddell, Vaizey & Smith, for F. C. Lloyd, Huddersfield.*

(1) The decision in the Court of Appeal turned entirely on the effect of the local Act, and no question was argued or decided as to the effect of the Local Government Act, 1888.

E. L.

## WOODHAM, Appellant *v.* LONDON COUNTY COUNCIL, Respondents.

1898 *April* 6.

*London County—New Street—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 9, *sub-s.* 4—"*Direct Communication.*"

Sect. 9 of the London Building Act, 1894, gives power to the county council to refuse their sanction to the formation of a new street where such street would not afford "direct communication" between two existing streets:—

*Held*, that the question whether a proposed new street did or did not afford such direct communication was a question of fact, with the decision of which the Court would not interfere.

Case stated by order of a judge in chambers, under s. 182 of the London Building Act, 1894, by the tribunal of appeal constituted by s. 175 of that Act.

On April 10, 1897, the appellant, who was the owner of certain land at Lewisham, in the county of London, applied to the London County Council, under the provisions of the London Building Act, 1894, for their sanction to the construction on such land of a new street for carriage traffic. The proposed new street was in the form of a right angle, and would communicate at one end with the Laleham Road, and at the other end with the Brownhill Road, which were then streets formed and laid out for carriage traffic. The London County Council refused their sanction on the ground that the new street would not at the time of forming and laying out afford direct communication between two streets formed and laid out for carriage traffic. The appellant appealed to the tribunal of appeal constituted by s. 175 of the London Building Act, 1894, which upheld the decision of the county council. (1)

(1) By the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 9, "In any of the cases following, but in no other case (that is to say) . . . .

"(4.) Where any street not being within the City is proposed to be formed and laid out in such manner that such street will not at and from the time of forming and laying out the same afford direct communication between two streets, such two streets being (where it

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*Bray, Q.C.* (*Alexander Glen* with him), for the appellant. The county council and tribunal of appeal were wrong. "Direct communication" cannot mean that the proposed street was to be absolutely straight. A crescent leading from one street to another affords direct communication between them—so do two sides of a square. As long as the street leads from one street to another, the county council have no power under the section to refuse their sanction. [He cited *London County Council* v. *Edmondson.* (1)]

*Horace Avory* (*Daldy* with him), for the respondent. This proposed street did not afford reasonably direct communication between two existing streets. It is a question of fact for the county council and the specially constituted and independent tribunal of appeal whether the proposed street will afford direct communication or not. They have exercised their discretion, and the Court will not interfere with it. The word "direct" must have some meaning, and it is for the properly constituted authority to say on each case whether the requirements of the Act are satisfied.

*Bray, Q.C.*, replied.

DAY J. This is a question of fact upon which the London County Council have pronounced an opinion, and upon which an appeal has been taken to the tribunal of appeal created by the Legislature. They have pronounced an opinion, and I do not see any reason for differing from them. They say that this proposed new street does not afford a reasonably direct communication between two existing streets, and I cannot say as a matter of law that they are wrong.

PHILLIMORE J. I am of the same opinion. I think, with regard to the words "afford direct communication," they must mean that the London County Council in the first place, and the specially constituted tribunal of appeal in the second place,

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is intended to form or lay out such street for carriage traffic) streets formed and laid out for carriage traffic . . . . it shall be lawful for the council . . . . to refuse to sanction . . . . the formation or laying out of such street . . . ."

(1) (1892) 66 L. T. 200.

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Phillimore J.

have to determine that as a question of fact. In many ways I should have been glad to accede to the argument of Mr. Bray and the contention that he has raised; but in my opinion we cannot interfere in this case with the finding of the competent tribunal on what seems to me to be a pure question of fact, so long as such finding is not one at which the tribunal ought not in law to have arrived. It is quite possible that "direct" means something other than absolutely straight; but here the tribunal has come to the view that this road does not afford reasonably direct communication, and I do not think that we can interfere with its decision.

*Appeal dismissed.*

Solicitors for appellant: *Crouch, Edwards & Heron.*
Solicitor for respondents: *W. A. Blaxland.*

A. P. P. K.

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1898
*April* 25.

CUCKFIELD RURAL DISTRICT COUNCIL, APPELLANTS v. GORING, RESPONDENT.

*Highway—Repairable ratione tenuræ—Person liable—Owner not in Occupation of Land—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 25, *sub-s.* 2.

By s. 25, sub-s. 2, of the Local Government Act, 1894, "Where a highway repairable ratione tenuræ appears . . . . not to be in proper repair, and the person liable to repair the same fails when requested so to do . . . . to place it in proper repair, the district council may place the highway in proper repair, and recover from the person liable to repair the highway the necessary expenses of so doing":—

*Held*, that an owner of lands who was not the occupier of them was not "the person liable to repair the highway" within the meaning of the section.

APPEAL from the county court of Sussex holden at Worthing.

The action was brought under s. 25 of the Local Government Act, 1894, to recover the expenses of repairing two wooden footbridges at Albourne, in the county of Sussex. (1)

(1) By the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25, sub-s. 2: "Where a highway repairable ratione tenuræ appears on the report of a competent surveyor not to be in proper repair, and the person liable to repair the same fails when requested so to do by the district council to place it in proper repair, the district council may place the highway in proper repair, and recover from the person liable to repair the highway the necessary expenses of so doing."

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The footbridges carried public footpaths over a stream, and both the footpaths and bridges were on land of which the defendant was the owner but not the occupier. It was contended that he was the person liable to repair ratione tenuræ.

The defendant having declined to do the necessary repairs on being requested to do so by the district council, the district council put the bridges in proper repair, and brought this action to recover the necessary expenses of so doing.

The county court judge gave judgment for the plaintiffs, and the defendant appealed.

*R. E. Moore* (*Marshall Hall* with him), for the appellant. The proceedings were misconceived. The person liable to repair a highway ratione tenuræ is not the owner, but the occupier of the land: *Reg.* v. *Barker* (1); *Baker* v. *Greenhill.* (2)

[He was stopped.]

*Dickens, Q.C.* (*Boxall* with him), for the respondents. The owner is now the person liable to repair. No doubt in the case of an indictment such as *Reg.* v. *Barker* (1) it is the occupier and not the owner who is to be indicted; but where proceedings are taken under s. 25 of the Local Government Act, 1894, to recover the expenses incurred by a district council in doing the necessary repairs, it is the owner who is the person liable. *Baker* v. *Greenhill* (2) shews that the occupier may demand reimbursement from the owner for any repairs that he has to do. As Lord Denman C.J. says in that case, the result of the authorities seems to be to throw the charge ultimately upon the owner, and throughout his decision in that case he treats the owner as being the person ultimately liable to perform the repairs. The Act of 1894, therefore, in giving a more expeditious way of getting a highway repaired, intended to make the owner liable for the costs incurred.

WILLS J. I feel no doubt whatever about this case. At the time the Local Government Act, 1894, was passed, it was well-settled law that an owner of lands who is not the occupier of them could not be charged ratione tenuræ with the repair of

(1) (1890) 25 Q. B. D. 213. (2) (1842) 3 Q. B. 148.

a highway. The occupier alone was the person liable. As Lord Coleridge C.J. puts it in *Reg.* v. *Barker* (1), "From the date of Rolles' Abridgement to the present time the placitum (B) 2, which lays down the law both in the affirmative and the negative that you must indict the occupier and cannot indict the owner, has been unquestioned." No doubt as between the occupier and the owner the occupier has a right, as was said in *Baker* v. *Greenhill* (2), to demand reimbursement from the owner; but that is a question between themselves with which the public at large have nothing to do. It is the occupier of the land and not the owner who has to do the repairs, and the occupier would have a right to object to the owner coming on his land for the purpose. He might well say that he preferred to do the repairs in his own way and at his own time, and the owner would have no right to interfere. The public, therefore, have no rights of any kind which they can enforce against the owner. Stress has been laid on a chance expression of Lord Denman in *Baker* v. *Greenhill* (2), and it has been urged that the decision in that case, that an occupier is entitled to be reimbursed by the owner for the repairs that he has been forced to do, is practically a decision that the owner is the person liable to do the repairs: a proposition which all the authorities have repudiated. The liability to reimburse the occupier is an entirely different thing from the liability to repair.

I do not think that the Act of 1894 in any way altered the incidence of liability. It placed highways under different management, and afforded a new means of getting repairs done and paid for. Can it be said that the phrase "person liable to repair the highway" in the section has cast the primary liability on the owner, in contradiction of the long chain of authorities to the opposite effect? It seems to me that to hold this would be to force and strain the language of the Act, and would lead to most undesirable results. In my opinion there was no intention when this Act was passed to make an owner liable who had never been liable before; but the object of the section was merely to give a simpler remedy against the person who

(1) 25 Q. B. D. 213. (2) 3 Q. B. 148.

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CUCKFIELD RURAL COUNCIL v. GORING.

was liable, namely, the occupier. These proceedings, therefore, have been misconceived, and the appeal must be allowed.

KENNEDY J. I am entirely of the same opinion, and for the same reasons.

*Appeal allowed.*

Solicitor for appellant: *Buckwell, Brighton.*

Solicitor for respondents: *C. H. Waugh, for Edward Waugh, Haywards Heath.*

A. P. P. K.

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1898

*April* 30.

## ROPER, APPELLANT *v.* KNOTT, RESPONDENT.

*Criminal Law—Malicious Injuries to Property Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 52—*Adding Water to Milk—Fraudulent Motive—Absence of Malice.*

A milk-carrier who damages his employer's milk by adding water to it, with no intention of injuring his employer, but in order to make a profit for himself by increasing the bulk of the milk, is guilty of an offence under s. 52 of the Malicious Injuries to Property Act, 1861.

*Hall* v. *Richardson*, (1889) 54 J. P. 345, disapproved.

CASE stated by a metropolitan police magistrate.

Upon the hearing of a charge made by the appellant, Roper, against the respondent, Knott, that the respondent did wilfully commit damage, injury, or spoil to four gallons of milk, the property of the appellant, contrary to the provisions of s. 52 of the Malicious Injuries to Property Act, 1861, the following facts were proved:—

The appellant was a milk salesman, carrying on business in South Hornsey, and the respondent, who was a milk-carrier in the employ of the appellant, came every morning to the appellant's place of business to fetch milk, which he subsequently sold to the appellant's customers.

On the morning of January 11, 1898, the respondent was seen at 5.25 A.M. by the appellant and a police constable, who were watching him, to conceal a three-pint can full of water in the garden of a house near the appellant's premises.

The respondent was then seen to fetch four gallons of milk

in a barrow from the appellant's premises (which in the ordinary course would be sold and delivered by him to the appellant's customers), and bring it opposite to the said garden, and was then seen to pour the said three pints of water out of the can into the said milk.

The respondent had been seen on a previous morning going into the same garden, and was watched on account of complaints from customers of the appellant.

The respondent was immediately taken into custody. He stated that he had on previous occasions been obliged to make good to his master in money the value of milk that he had lost; but there was no evidence of this, and it was contradicted by the appellant.

The appellant in his evidence said that he was in the habit of allowing each of the milk-carriers in his employ (including the respondent) two quarts of milk a day to cover any loss that might arise from accidental spilling of the milk they took out, or from the same being stolen from the customer's door, and also stated that he would have allowed a greater quantity had the milk-carrier complained that he had lost more than two quarts.

The respondent had not served any customers on the morning of January 11 before he was taken into custody.

The whole of the milk after it had been so watered was in fact damaged and spoiled, and was thrown away, and the loss thereby caused amounted in value to the sum of 10*s.* 8*d.*

On behalf of the respondent it was contended that, in view of the decision in *Hall* v. *Richardson* (1), the respondent could not under the circumstances be convicted of the offence charged. The magistrate was of opinion that the respondent acted in a fraudulent way, and that his object in adding water was to increase the bulk of the milk, and to put money into his own pocket by selling the surplus and not accounting for it to his master, but that there was no malice towards or intention to injure the appellant. He felt himself bound by the decision in *Hall* v. *Richardson* (1), and accordingly dismissed the charge.

The question for the opinion of the Court was whether on

(1) 54 J. P. 345.

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these facts the respondent could be legally convicted under s. 52 of the Malicious Injuries to Property Act, 1861. (1)

*Horace Avory*, for the appellant. The difficulty is caused by *Hall* v. *Richardson*. (2) Unless that case amounts to a decision that milk is not a subject of damage within the section, the case is plain. The section provides against wilful *or* malicious damage, and, whatever the respondent's motive may have been, if he intentionally added the water to the milk he committed an offence within the meaning of the section. It matters not that he did not primarily intend to damage the milk, or that he had no malice against his master. If he in fact damaged the milk by a wilful or intentional act, that is sufficient. If *Hall* v. *Richardson* (2) is contrary to this it cannot be supported. [He cited *Reg.* v. *Pembliton* (3); *Hamilton* v. *Bone*. (4)]

The respondent did not appear.

LORD RUSSELL of KILLOWEN C.J. In this case we have to give judgment on a case stated for our opinion by a metropolitan police magistrate, and to say whether on the facts there set out he ought or ought not have convicted the person charged before him of the offence with which he was charged. It is quite natural, I think, that the learned magistrate, having regard to the decision of Lord Coleridge C.J. and Mathew J. in *Hall* v. *Richardson* (2), should have hesitated to convict the respondent. The charge against the respondent is based on

(1) By s. 52 of the Malicious Injuries to Property Act, 1861 (24 & 25 Vict. c. 97), "Whosoever shall wilfully or maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only or to be imprisoned and kept to hard labour for any term not exceeding two months, or else shall forfeit and pay such sum of money not exceeding five pounds as to the justice shall seem meet, and also such further sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed not exceeding the sum of five pounds, which last-mentioned sum of money shall, in the case of private property, be paid to the party aggrieved."

(2) 54 J. P. 345.

(3) (1874) L. R. 2 C. C. 119.

(4) (1888) 52 J. P. 726.

s. 52 of 24 & 25 Vict. c. 97, and the facts are shortly as follows. The complainant was a milk salesman, and the respondent was a milk distributor in the complainant's employment. On the particular morning in question the respondent was detected in the act of adding a considerable quantity of water to milk which was the property of the complainant, and which it was the respondent's duty to deliver to the complainant's customers in a pure state. The magistrate has found that the respondent did this in order that he might increase the bulk of the milk and so sell more, and put the surplus money into his own pocket. As a fact the milk was damaged and spoiled by the addition of the water, and it had to be thrown away; but the magistrate finds that the respondent was not actuated by any malice against the complainant, and that he had no desire or intention to injure him. When one comes to look at the statute one finds a number of provisions covering specific cases of damage to various descriptions of property. Sect. 52, under which these proceedings were taken, differs, however, in its introductory words from all the other sections. Sects. 51 and 52 deal with injuries not before provided for in the Act; but while s. 51 follows the wording of other sections in using the expression "unlawfully and maliciously," s. 52 says, "whosoever shall *wilfully or maliciously* commit any damage, injury, or spoil to or upon any real or personal property whatsoever." It is quite clear, therefore, that the Legislature intended to draw in this section a distinction between acts which are unlawful *and* malicious, and acts which are merely wilful *or* malicious. The first question, therefore, that we have to ask ourselves is, Was this "damage, injury, or spoil" done to the milk? That is answered very clearly by the finding of the magistrate that the whole of the milk after it had been so watered was in fact damaged and spoiled and was thrown away.

If, then, the milk was damaged, was it wilfully damaged? There can, I think, be no doubt as to that. The respondent added this water to the milk deliberately and intentionally, and with the fraudulent motive of increasing the bulk of the milk so as to gain an advantage for himself. It seems to me, in construing this section, that a man must be held to do a thing

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wilfully when he does it either intending to cause damage, or knowing that the act that he commits will cause damage to the property on which it is committed. I feel no doubt that the respondent was guilty of committing wilful damage to property within the meaning of this section. That leads me to the consideration of the case of *Hall* v. *Richardson*. (1) The first thing that strikes one in regard to that case is that it was a very natural thing for the magistrate there not to desire to convict the defendant, and for the Court on appeal to share that desire. There was there no intention to defraud any one, the water being merely added in order to make up the quantity of milk that had been lost by an accident with which the defendant had met, and that his master in fact lost nothing by what he had done. It might, therefore, have been better to have left the case where the magistrate did, and for the Court merely to have declined to interfere with his decision on the ground of the trivial character of the offence. They thought it right, however, to deliver a judgment on the question, and, that being so, it becomes our duty to consider that decision, inasmuch as the learned magistrate in this case, acting on that decision, declined to convict. I may say in passing that I think it would clearly be possible to distinguish the two cases on the facts, but it seems to me that it is right that we should deal with the principle there laid down. I must say that in my opinion *Hall* v. *Richardson* (1) was a case in which damage was done to the milk, and was done wilfully. Then is that decision right? I am bound to say that I think it is not. The first, and I think—if I may say so, with the greatest deference to the very learned judges who decided that case—the cardinal, error in that decision is that there is a confusion between the damage to the property and the consequent loss or damage to the owner of the property. In my judgment an offence has been committed against the statute if wilful damage has been done to any property, quite irrespective of the question whether any damage has been sustained by the owner of the property, although it is clear that the latter result will commonly follow. The second error, as it seems to me, appears in

(1) 54 J. P. 345.

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the judgment of Lord Coleridge C.J., in which he seems to think that in order to constitute an offence under the section there must be an intention to injure or damage somebody. That, as I have already pointed out, is not so in my opinion. It is sufficient if wilful damage has been done to property. No doubt if the wording of the section were like that of the other sections, wilful (or unlawful) "*and* malicious," the case would be different. In the last place, the remarks of Lord Coleridge C.J. as to the power of the magistrate to order reasonable compensation under the section for any damage done to property seem to shew that he thought that the section only applied to cases where such compensation was needed. All these reasons, which as I think are mistaken, spring no doubt from what I have called the cardinal error in this judgment. I think, therefore, that the decision in *Hall* v. *Richardson* (1) cannot be supported, but that this appeal must be allowed, and the case remitted to the magistrate to convict the respondent.

DAY J. I concur.

WILLS J. I am entirely of the same opinion. In the case of *Gardner* v. *Mansbridge* (2), to which A. L. Smith L.J. and I were parties, we pointed out that a person commits an offence against s. 52 if he wilfully commits the act, even though he has no malice. In my opinion, the act meant by the Act of Parliament is a wilful doing of something which the man doing it knows must damage property. If it could be shewn that he did not know that any damage to property would result from his act, then I think he could not be convicted under this section.

GRANTHAM J. I am of the same opinion. No doubt it may be said that this Act of Parliament was intended to meet cases of a different character to that now before us, and I think that that appears from a glance at the other sections of the Act. But it seems to me that s. 52 was introduced in order to sweep up in one general section a number of smaller offences for which

(1) 54 J. P. 345. (2) (1887) 19 Q. B. D. 217.

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no penalty had been imposed by the rest of the Act. This is no doubt the reason of the change in the language of s. 52 which has been pointed out by my Lord, and it is impossible not to see that that change must have been intentional.

The three questions that arise on a charge under this section are therefore: Was this property? Has it been damaged? And, Has that damage been done wilfully? The answer in this case to all those three questions being in the affirmative, the defendant must be convicted. That being so, we cannot reconcile this decision with *Hall* v. *Richardson* (1), and it becomes necessary for us to say that in our opinion that case is not law.

WRIGHT J. I agree.

KENNEDY J. I am of the same opinion. It seems to me impossible to distinguish this case from that of *Hall* v. *Richardson* (1); and therefore I agree entirely in the view of that decision expressed by my Lord.

CHANNELL J. I am of the same opinion.

*Case remitted to magistrate to convict.*

Solicitors for appellant: *C. V. Young & Windsor.*

(1) 54 J. P. 345.

A. P. P. K.

[CROWN CASE RESERVED.]

1898
*April* 2.

## THE QUEEN *v.* HUMPHREY.

*Criminal Law—Betting—Place used for Betting—Archway in Street—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3.

The prisoner was in the habit of going to an archway which was a private thoroughfare leading from a public street into a yard containing dwelling-houses, stables, and workshops, for the purpose of betting with persons resorting to him there :—

*Held*, that the archway was a "place" within the meaning of the Betting Act, 1853, and that the prisoner was rightly convicted under that Act.

*Powell* v. *Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242, considered.

CASE stated for the consideration of the Court for Crown Cases Reserved by the Recorder of Leeds.

"John Humphrey was tried before me at the Epiphany quarter sessions for the city of Leeds on January 6, 1898, upon an indictment charging him (under 16 & 17 Vict. c. 119), with having on the 3, 4, 5, 9, and 24 of November, 1897, opened, kept, and used a certain place, to wit, an archway in Princess Street in the said city, for the purpose of betting with persons resorting thereto upon certain events and contingencies of and relating to certain horse-races.

"The following facts were proved by the witnesses for the prosecution :—

"(*a.*) That on each of the days named in the indictment the said John Humphrey had been present in the said archway for divers periods between 12.30 and 2 P.M., and had on each of those occasions there made bets upon horse-races, receiving money, giving tickets, and making entries in a book with several persons resorting thereto on the said occasions, varying in number from 13 to 40.

"(*b.*) That when the said bets were made the said John Humphrey was standing sometimes on one side and sometimes on the other of the said archway, and that he had on the first

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of such occasions also made several bets in Princess Street, outside the archway.

"(*c.*) That the said archway was a private thoroughfare, the property of Messrs. Gaunt & Hudson, millowners, and was the only means of access from Princess Street into a yard at the back of their said mills, containing four dwelling-houses, three stables, and five workshops, which were also their property.

"(*d.*) That neither the said John Humphrey nor any other person had any right in the said archway at any time except for the purpose of passing through the same into the said yard and to the houses, stables, and workshops therein.

"(*e.*) That the said archway was 29 ft. 9 in. long by 10 ft. 11 in. wide, and 12 ft. high.

"At the conclusion of the case for the prosecution counsel for the defence submitted that there was no evidence upon which it could properly be found that the said John Humphrey had used for the purpose of betting any place akin or equivalent to a house, office, or room, and that there was therefore no evidence of any offence within the meaning of the statute aforesaid, and that I ought to direct an acquittal.

"I declined to withdraw the case from the jury, and directed them that the evidence shewed that the archway was a 'place' within the meaning of the said statute, and that if they believed that the said John Humphrey had on the days specified in the indictment used it for the purpose of betting, they ought to find him guilty.

"The jury found the said John Humphrey guilty, and I sentenced him to pay a fine of 20*l.*

"On the application of counsel for the defence, I reserved the following question of law for the consideration of the Court, viz.:—

"Whether I was right in leaving the case to the jury, and in so directing them as aforesaid."

*Joseph Walton, Q.C.* (*George Banks* with him), for the appellant. This was not a place analogous in its character and use to a betting house or office, and it therefore falls within the decision of the Court of Appeal in *Powell* v. *Kempton Park*

*Racecourse Co.* (1), which expressly disapproved of *Hawke* v. *Dunn*. (2) That is really a stronger case than this, which is merely a case of street betting. The user for the purpose of betting necessarily implies, as is pointed out by Lord Esher M.R. (3), some exclusive right to the place as against other persons. In this case, although no doubt the archway was capable structurally of being used as a place within the meaning of the Act, it was in fact a thoroughfare, and the appellant had no exclusive occupation of it as against any one.

*Asquith, Q.C.*, and *Felix Palmer*, in support of the conviction, were not called upon to argue.

LORD RUSSELL of KILLOWEN C.J. We are in effect asked in this case to say whether the verdict at which the jury arrived in this case is supported by adequate evidence. That is the real question we have to decide. A question might have arisen whether the learned recorder was right in directing the jury that this archway was a place within the meaning of the Act, and whether it would not have been better for him to have given the jury his views on what was and what was not a place within the meaning of the Act, and then asked them to say whether on the evidence this archway was a place used for the purpose of betting by the defendant on the day in question. But that question is not raised, and therefore we are not troubled with it to-day.

It is contended that the conviction was wrong, and the main ground of that contention is the judgments of the Court of Appeal in the case of *Powell* v. *Kempton Park Racecourse Co.* (1) I do not now stop to consider, nor do I express any opinion upon, the question whether that judgment is an authority which this Court is bound to follow. It is quite clear that the opinions expressed by the learned judges in that case must be treated by us with deference and respect. But the question now is whether the decision on that case is one in view of which we ought to say that no offence has been committed by the defendant in this case. It would be a matter for the greatest regret,

(1) [1897] 2 Q. B. 242. (2) [1897] 1 Q. B. 579.
(3) [1897] 2 Q. B. at p. 257.

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and would be in my opinion most injurious to the public interest, if it were so. But I think that the case of *Powell* v. *Kempton Park Racecourse Co.* (1) has no such effect. It is necessary to recollect the facts on which that case was decided. The charge there was of betting on a racecourse to which multitudes of people were in the habit of resorting for the purposes of sport. On the racecourse in question there was an inclosure to which people who wished to see the races and to be sheltered from the weather might resort. It was proved that every one who chose to pay the charge for admission had access to this inclosure, and that it contained some two thousand people. Some of these, who were known as bookmakers, went there for the avowed purpose of betting with any one who wished to bet with them; others went there who were not bookmakers, but who, nevertheless, wished to bet on certain horses—to back their fancy, as it is called; others, again, went to the inclosure, not for the purpose of betting at all, but for the genuine purpose of watching the races. There was no appropriation of any part of the inclosure or of any special spot in the inclosure, nor was there any user of any particular part or spot of the inclosure for the purpose of betting. In that consists the difference between the present case and *Powell* v. *Kempton Park Racecourse Co.* (1) I do not wish to express any unnecessary opinion on that decision; but when one recollects the number of inclosed racecourses in this country, it seems certainly difficult to say (if that case is good law) that betting on any part of such inclosed racecourse would not constitute an offence within the meaning of the Act. But when we consider the facts here, we find that the place in question is a gateway open at one end to the street, and leading at the point farthest from the street to a court. The defendant habitually resorted there, and presented himself to persons desirous of betting with him—holding the bank, as it were, against all comers—and ready to bet with any one. This is betting of the worst possible description, into which no consideration of sport enters at all. The betting takes place away from any racecourse, and without any palliating circumstances. The defendant was lying in wait to bet with any persons who

(1) [1897] 2 Q. B. 242.

were willing to bet with him. It was not contended by the learned counsel that structurally this archway was incapable of being considered a "place" within the meaning of the Act. It is plain from the cases on the subject that the archway may be such a place. Then the only question is whether the defendant used the place for the purpose of betting. Unquestionably he did. He was there for no other purpose than that of betting with all persons resorting to him. Therefore I am of opinion that this was a place used by the defendant for the purpose of betting with persons resorting thereto, and that he has committed an offence against the Act. The conviction must be affirmed.

In conclusion, I would desire to say that it seems to me not only not for the public advantage, but a serious public evil, that the ambiguity which surrounds this subject should exist. It is impossible to reconcile the various decisions on this question, and the results of the judicial disagreement and the consequent ambiguity are most deplorable. I can only express the opinion that there is urgent need for legislation on the subject—legislation best, perhaps, preceded by a commission of inquiry.

HAWKINS J. I entirely agree as to the decision of this case. It is in accordance with our considered judgment in *Hawke* v. *Dunn* (1), which affirmed an opinion I had already expressed in *Reg.* v. *Preedy*. (2) I absolutely adhere to the judgments I delivered in those two cases. Of course, I speak of the decision of the Court of Appeal in *Powell* v. *Kempton Park Racecourse Co.* (3) with the greatest deference, but I will only say that the circumstances on which that decision was given were very peculiar, and that I do not wish to be understood as expressing any approval of it.

I quite agree with my Lord as to the pressing necessity of legislation on the subject.

WILLS J. I am of the same opinion. It appears to me that the result of the decision in *Powell* v. *Kempton Park Racecourse*

(1) [1897] 1 Q. B. 579. (2) (1888) 17 Cox, 433.
(3) [1897] 2 Q. B. 242.

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*Co.* (1) is that the test whether an offence has been committed within the meaning of the Act depends on several circumstances. The spot in question must be capable of being described as a "place," and it must be used for the purpose of betting.

In that broad general view I agree, and it seems to me that we have here exactly that conjunction of circumstances. The archway here is well within the description of a "place" given by Lord Esher M.R. in *Powell* v. *Kempton Park Racecourse Co.* (1), and the user by the defendant is clearly within the meaning and mischief of the Act.

As so much has been said about *Powell* v. *Kempton Park Racecourse Co.* (1), I should like to say that, as that decision is entitled to be treated with the greatest respect—if, indeed, it is not actually binding upon us—I regret the manner in which that case was brought before the Court of Appeal. It was expressly brought by agreement between the parties to get rid of the decision in *Hawke* v. *Dunn* (2), and it was practically a collusive action. The parties agreed on a statement of facts as to the antiquity of the kind of betting involved both in that case and in *Hawke* v. *Dunn* (2) which may or may not be true, which there is no means of testing, which unquestionably was calculated to influence the construction of the statute, and which was unfortunately accepted and in some measure relied upon in the Court of Appeal. In so far as that collusive statement influenced the decision the value of the judgment must be impaired.

KENNEDY J. I agree that this conviction must be affirmed; and I think that we are only following the decision of Lindley and Kay L.JJ., sitting as a Divisional Court, in *Liddell* v. *Lofthouse* (3)—a case in which the facts are practically undistinguishable. That decision was expressly approved in *Powell* v. *Kempton Park Racecourse Co.* (1), and I do not think that in arriving at this conclusion we are in any way differing from the opinion of the Court of Appeal in that case.

(1) [1897] 2 Q. B. 242. (2) [1897] 1 Q. B. 579.
(3) [1896] 1 Q. B. 295.

RIDLEY J. I agree entirely in the judgment delivered by my Lord. 1898

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*Conviction affirmed.*

Solicitor for appellant: *H. A. Child, Leeds.*
Solicitor for respondent: *W. Ward, Leeds.*

A. P. P. K.

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## PRIOR *v.* SLAITHWAITE SPINNING COMPANY, LIMITED.

1898
*April* 28, 29.

*Master and Servant—Employment of Young Person during Prohibited Hours—Working for Amusement—Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *ss.* 17, 83, 94.

A young person in the employment of the occupiers of a spinning mill during the time allowed for a meal oiled part of the machinery of the mill. He stated that he did so contrary to orders, and for his own amusement:—

*Held*, that he was working in what he did, and that, therefore, he was employed during prohibited hours contrary to the provisions of the Factory and Workshop Act, 1878, and that the occupiers of the mill were liable to a fine under s. 83 of that Act.

CASE stated by justices.

The appellant was one of Her Majesty's inspectors of factories, and the respondents were the owners and occupiers of certain spinning mills at Slaithwaite, near Huddersfield, such mills being a textile factory within the meaning of the Factory and Workshop Act, 1878.

In accordance with the requirements of the Factory and Workshop Act, 1878, the respondents fixed and specified in a notice affixed to their factory the period of employment and the times allowed for meals, one of the times for meals being from 12.30 to 1 P.M.

On an information preferred by the appellant against the respondents, charging that the respondents did on November 5, 1897, employ Herbert Garside, a young person, during a time specified as a time allowed for meals and absence from work, the following evidence was given:—

The appellant stated that he visited the respondents' mill on the day in question, and found Herbert Garside at work at ten

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minutes to one in the day. He said, in reply to questions by the appellant, that he was cleaning the spindles.

Herbert Garside said that he had had his dinner in the mill because it was warmer than outside. He had finished his dinner, and because he had nothing else to do to pass the time away he got hold of the oil-can and was oiling the spindles. It was no part of his duty to oil the spindles, and no one told him to do so, nor did any of the managers know that he was oiling them. He would not receive any extra payment for oiling them. What he did was contrary to orders and done of his own accord.

The attention of the magistrates was called to s. 94 of the Act; but they were of opinion, and found as a fact on the evidence, that there was no evidence of employment of the said Herbert Garside by the respondents in contravention of the Factory and Workshop Act, 1878, and accordingly dismissed the information. (1)

(1) By the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), s. 17, sub-s. 2: "A child, young person, or woman shall not during any part of the times allowed for meals in the factory or workshop, be employed in the factory or workshop."

By s. 83, "Where a child, young person, or woman is employed in a factory or workshop contrary to the provisions of this Act, the occupier of the factory or workshop shall be liable to a fine not exceeding three . . . . pounds for each child, young person, or woman so employed. . . . . A child, young person, or woman who . . . . during any part of the times allowed for meals and absence from work is, in contravention of the provisions of this Act, employed in the factory or workshop . . . . shall be deemed to be employed contrary to the provisions of this Act."

By s. 86, "Where an offence for which the occupier of a factory or workshop is liable under this Act to a fine has in fact been committed by some agent, servant, workman, or other person, such agent, servant, workman, or other person shall be liable to the same fine as if he were the occupier."

By s. 87, "Where the occupier of a factory or workshop is charged with an offence against this Act he shall be entitled upon information duly laid by him to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge, and if, after the commission of the offence has been proved, the occupier of the factory or workshop proves to the satisfaction of the Court that he had used due diligence to enforce the execution of the Act, and that the said other person had committed the offence in question without his knowledge, consent, or connivance, the said other person shall be summarily convicted of such offence, and the occupier shall be exempt from any fine.

"When it is made to appear to the

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*The Solicitor-General* (*Sir R. B. Finlay*), (*H. Sutton* with him), for the appellant. The magistrates have misconceived their duty, and have not appreciated the question with which they had to deal. It was admitted that this boy was a young person within the meaning of the Factory and Workshop Act, 1878; and by s. 17, sub-s. 2, he was not allowed to be employed in the factory or workshop during any part of the time allowed for meals; and by s. 94 a young person who works in a factory or workshop, whether for wages or not, in cleaning or oiling any part of the machinery shall be deemed to be employed within the meaning of this Act. Then, by s. 83, where a young person is employed in a factory or workshop contrary to the provisions of this Act, the occupier of the factory or workshop shall be liable to a fine. The scheme of the Act is to throw on the employer the duty of seeing that the provisions of the Act are carried out, and, unless he can shew under s. 87 that the work was done by the direction of some third party, he is liable for any infringement. The question is not, as the magistrates seemed to think, whether this boy was employed by the respondents to do this work, but whether he was doing this work upon the respondents' premises during meal-time. It is not a question of employment by the respondents at all.

*J. F. P. Rawlinson*, *Q.C.* (*Harper* with him), for the respondents. There was no evidence that this boy was working. The attention of the magistrates was called to s. 94, and they have found as a fact that he was not employed. They must, therefore, be taken to have found that in oiling the machinery

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satisfaction of an inspector at the time of discovering the offence that the occupier of the factory or workshop had used all due diligence to enforce the execution of this Act, and also by what person such offence had been committed, and also that it had been committed without the knowledge, consent, or connivance of the occupier, and in contravention of his orders, then the inspector shall proceed against the person whom he believes to be the actual offender in the first instance without first proceeding against the occupier of the factory or workshop."

By s. 94, "A child, young person, or woman who works in a factory or workshop, whether for wages or not . . . . in cleaning or oiling any part of the machinery . . . . shall . . . . be deemed to be employed therein within the meaning of this Act."

By s. 96, "The expression 'young person' means a person of the age of fourteen years and under the age of eighteen years."

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he was not in fact working. The evidence is clear that what he did was for his own amusement. There must be a distinction between "cleaning" and "working in cleaning." It is clear that the respondents used all due diligence to enforce the provisions of the Act, and that the offence, if it was an offence, was wantonly committed by the boy himself.

[WILLS J. Do you suggest that the boy himself could be made liable under ss. 86 or 87?]

No; the Act is for the protection of young persons, and the offences aimed at by it must be something in the nature of active employment. There is no section which makes it an offence on the part of the young person to work during prohibited hours.

The provision of s. 94, that a young person working shall be deemed to be employed, is a presumption which may be rebutted by the employer shewing, as under ss. 86 and 87, that the young person was not employed by him to do the work in question. "Employed," therefore, in the Act must be read as meaning "employed by the occupier of the factory": *Hopkinson* v. *Caunt* (1); and the magistrates have found that this boy was not so employed. Unless the act which constitutes the offence must be done by the orders, or under the sanction of the occupier of the factory, it will be open to any ill-disposed person under eighteen years of age to subject his employer to a fine by wilfully cleaning or oiling a machine during prohibited hours. It is sufficient for the employer to shew, as he has done here, that the offence was not committed by him, but by some other person—that is to say, the young person himself.

*The Solicitor-General* replied.

WILLS J. I think that this appeal must succeed. The question is of considerable importance. No doubt extravagant cases may be put, as, for instance, that of a young person who is within a day or two of his eighteenth birthday, and who is quite as well able to take care of himself as he would be a few days later. But the line between a young person and an adult must be drawn somewhere, and the Legislature has fixed that

(1) (1886) 14 Q. B. D. 592.

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period at eighteen. Possibly that is placing a rather liberal interpretation on the expression "young person," but with that we have nothing to do. It is a very legitimate consideration whether cases which present that sort of extravagance against which the mind revolts are likely to be of frequent occurrence, and whether it is not a necessity that legislation which is meant to cover a large class of cases to which it is most properly applicable should not also from time to time include cases which seem startling.

It is clear that the policy of this Act in regard to this question of working at meal-times is that persons who are regarded by the Legislature as comparatively defenceless should have their meal-times preserved intact. For that purpose the legislation is no doubt rigorous. But, whether it is rigorous or not, all that we have to do is to see whether the particular case before us falls within the purview of the Act of Parliament.

In this case, then, the magistrates have found that this lad was cleaning or oiling the shaft during the prohibited time. It is contended that in so doing he was not "working," and I quite agree that signification must be given to the word "work." I can conceive cases where a boy might be oiling machinery and yet not "working." But in the present case it appears that he was doing exactly what he would have done had he been working under orders. Of course a person may work very hard to amuse himself, as I myself have often done in my own garden. In one sense no doubt that is work, but it is not the common application of the term. Here the mere fact that this boy, as he says, did this to please himself and without orders from any one does not, I think, make it any the less work. In my opinion, therefore, he was working; nor do the magistrates find that he was not working. All that they find is that there was no evidence that he was employed by the respondents to do this work. That no doubt is quite true, but the Act of Parliament has not introduced any such qualification; on the contrary, it has said (s. 94) that if a young person works during the prohibited hours he shall be deemed to be employed. I take that to mean that for all purposes connected with this particular legislation he shall be regarded as employed

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if he does any work. I do not agree that it is merely a rebuttable presumption. If, therefore, he *works* during the prohibited hours, as he is to be deemed to have been *employed*, s. 17, sub-s. 2, has been broken, and he has been employed contrary to the provisions of the Act.

Under those circumstances s. 83 makes the employer liable. It is not necessary, I think, now to discuss what are the limits of s. 87, nor does it seem to me at all desirable to do so. In the present case I am clearly of opinion that the employer is not in a position to claim the benefits of s. 87, because the magistrates had no information duly laid before them that the employer charged any other person as the actual offender, and that certainly is a condition precedent to the operation of s. 87 in the employer's favour.

It has been urged that there are cases of hardship in which the moral offence cannot be brought home to anybody, and in which, therefore, the employer is liable, although he really was not responsible for what was done. The true answer to that is, I think, the absolute and unfettered discretion which is vested in the justices both of moderating the fine and of dealing with the costs. It seems to me, therefore, that there is really no answer to this prosecution, and that the case must be remitted to the justices to convict.

KENNEDY J. I entirely agree. I have come without any doubt to the conclusion that the magistrates ought to have convicted in this case. They have found that there was no evidence of employment of this boy by the respondents contrary to the Factory and Workshop Act, 1878.

I think the scheme of the Act is clear, namely, that the health of these comparatively defenceless persons is to be protected by their having the full time of their meal-times intact without doing any work at all in that time. By s. 17 young persons shall not during any portion of the time allowed for meals be employed in the factory or workshop. By s. 94 the word "employed" is defined as including the very work which it is clear on the evidence this boy did in this case. Primâ facie, the employer is to be held responsible for any breach of

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the provisions of the Act. If he can shew that he has used all due diligence to enforce the execution of the Act, and that the offence has really been committed by some other person, then under ss. 86 and 87 he is protected. But even if he cannot, as here, obtain the protection of those sections, still, as my brother has pointed out, the magistrates may be trusted to use the discretion that is given them in inflicting a fine and dealing with the costs. Moreover, since the provisions of the Act are generally put in force by a Government official, it may be assumed that he will not be forward to take proceedings where every care was taken by the employer and his subordinates, and the breach of the Act has been caused by the wanton conduct of the young person himself. I would further point out that by the express words of s. 87, "When it is made to appear to the satisfaction of an inspector at the time of discovering the offence that the occupier of the factory or workshop had used all due diligence to enforce the execution of this Act, and also by what person such offence had been committed, and also that it had been committed without the knowledge, consent, or connivance of the occupier and in contravention of his orders, then the inspector shall proceed against the person whom he believes to be the actual offender in the first instance without first proceeding against the occupier of the factory or workshop." It is not necessary that the magistrates should find that there was an employment of this boy by the respondents; he was "working," and so (under s. 94) "employed" during a prohibited time in the factory of which the respondents were the occupiers. I think that the conclusion to which the magistrates came was not justified by the facts before them.

*Case remitted to the magistrates to convict.*

Solicitor for appellant: *The Treasury Solicitor.*

Solicitors for respondents: *Learoyd & Co., for Learoyd, James & Co., Huddersfield.*

A. P. P. K.

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*March* 24, 26, 30; *May* 7.

[IN THE COURT OF APPEAL.]

## MARKS *v.* FROGLEY AND OTHERS.

*Volunteer—"Subject to Military Law"—"When being Trained or Exercised with Regular Forces"—Returning from Training—Assault and False Imprisonment—Obedience to Order of Superior Officer—Army Act*, 1881 (44 & 45 *Vict. c.* 58), *ss.* 41, 43, 45, 158, 176—*Volunteer Act*, 1863 (26 & 27 *Vict. c.* 65), *s.* 21.

The plaintiff was a member of a volunteer corps, which was trained and exercised with a portion of the regular forces at Shorncliffe Camp under an order of the War Office, forming a volunteer brigade for the purpose of such training and exercise during the period, August 1 to August 8, 1896. Upon the latter day, while preparations were going on for the departure of the volunteers from the camp, he was charged with larceny from a comrade. The adjutant of the corps gave orders that he should be taken under arrest with the baggage guard to Shorncliffe Station, and thence to Boxmoor Station, in the special military train which was on that day to convey the corps home, and that on arrival at the latter station he should be taken to Hemel Hempstead, where he lived, and handed over to the police authority there. The plaintiff was accordingly taken under arrest to Shorncliffe Station, and three of his comrades were there told off to form his escort in the train and to take him from Boxmoor Station to Hemel Hempstead, and there hand him over to the police, which they did.

In an action against them for assault and false imprisonment:—

*Held* (reversing the judgment of Kennedy J.), that, by virtue of s. 176 of the Army Act, 1881, the members of the corps were subject to military law from the time when they fell in on August 1 for the purpose of proceeding to the camp to be trained and exercised with the regulars until on their return home on August 8 they were dismissed; and that the plaintiff and defendants were therefore subject to military law at the time when the defendants did the acts complained of, which were consequently justified under ss. 41 and 45 of the Army Act, 1881:

*Held*, also, that the acts of the defendants were justified by virtue of the provisions of s. 158 of the Army Act, 1881.

The words "where an offence under this Act has been committed" in that section mean "where an offence under this Act is alleged to have been committed."

APPLICATION by defendants other than Frogley for judgment or new trial on appeal from the judgment of Kennedy J. (1) The nature of the action and the facts sufficiently appear

(1) Ante, p. 396.

from the report of the case in the Court below and the judgments.

March 24, 26, 30. *Lawson Walton*, *Q.C.*, and *R. D. Muir* (*G. Humphreys* with them), for the defendants. By s. 41 of the Army Act, 1881, larceny is an offence against military law, and the military authorities have the option of trying it themselves by court-martial or handing over the offender to be tried by the ordinary criminal tribunal. See also s. 18, sub-s. 4, of the Act. By s. 41 (*b*) a person subject to military law, when in Her Majesty's dominions, may be tried by any competent civil court for any offence for which he would be triable if he were not subject to military law. Sect. 45 of the Act provides for the arrest and military custody of a person subject to military law who is charged with an offence under the Act. Sect. 176 of the same Act renders subject to military law as soldiers, among other persons, all non-commissioned officers and men belonging to the volunteer forces of the United Kingdom, when being trained or exercised with any portion of the regular forces. This provision must apply to volunteers as a regiment proceeding to and returning from such training and exercise.

The period mentioned in the order of the War Office, by which the volunteer brigade was constituted for the purpose of training and exercise with the regular forces at Shorncliffe, included August 8, the day on which the corps returned home from Shorncliffe; and by the Regulations for the Volunteer Forces, s. 573, an additional allowance per day is made to volunteers to cover the time occupied in proceeding to and returning from such training and exercise. Therefore, both plaintiff and defendants were subject to military law from the time when they joined their corps to proceed to Shorncliffe till they were dismissed from duty on their return home. If they were so subject, all that was done by the defendants in obedience to the orders given by the adjutant was justified under ss. 41 and 45 of the Army Act, 1881.

But, assuming that the corps ceased to be subject to military law when they left the camp at Shorncliffe, the acts of the defendants in relation to the plaintiff were justified by virtue of

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s. 158 of the Army Act, 1881, which provides that "where an offence under this Act has been committed by any person while subject to military law, such person may be taken into and kept in military custody, and tried and punished for such offence, although he, or the corps or battalion to which he belongs, has ceased to be subject to military law, in like manner as he might have been taken into and kept in military custody, tried or punished, if he or such corps or battalion had continued so subject." At the time when the plaintiff was first arrested, he was charged with a military offence, and was undoubtedly subject to military law. Sect. 158 must obviously be construed as applying where an offence under the Act is alleged to have been committed. It would be absurd that a provision for arrest and trial should be confined to cases where on the trial the person charged is found guilty, thus giving a hypothetical jurisdiction and leaving all those who act under it subject to an action of false imprisonment, if the prisoner should be acquitted. Reading this section in conjunction with s. 41 (*b*), it is clear that under it a person who has ceased to be subject to military law may be arrested and kept in military custody for the purpose of being handed over to be tried by the civil court. There being power given by the above-mentioned sections of the Army Act, 1881, to the military authorities to arrest an offender in cases within s. 41, and hand him over for trial by any competent civil court, it follows by implication that authority must be given to them to take such steps for so handing over the offender as may be reasonably necessary, such as handing him over to the police of the proper locality.

Assuming that the orders given by the adjutant were not justified by the Army Act, nevertheless the defendants are exonerated on the ground that both the plaintiff and they were in the position of soldiers, and they were bound to obey the orders of their superior officer, provided they were not obviously illegal: see per Willes J. in *Keighly* v. *Bell* (1); *Dawkins* v. *Lord Rokeby* (2); *Dawkins* v. *Lord Paulet*. (3) Under those

(1) (1866) 4 F. & F. 763. (2) (1866) 4 F. & F. 806.
(3) (1869) L. R. 5 Q. B. 94.

circumstances the only remedy open to the plaintiff was by complaint under s. 43 of the Army Act, 1881. (1)

*Tassell*, for the plaintiff. The keeping of the plaintiff in custody ceased to be legal as soon as the corps left the camp. The plaintiff and defendants ceased to be subject to military law under s. 176 of the Army Act, 1881, and became civilians when the corps to which they belonged ceased to be engaged in training and exercise with the regular forces—that is to say, when they left Shorncliffe Camp. They cannot be said to have been engaged in such training and exercise while on their way home, and therefore they had ceased to be subject to military law, although they might be subject to volunteer discipline under s. 21 of the Volunteer Act, 1863 (26 & 27 Vict. c. 65). It cannot be that what was done by the defendants after they and the plaintiff ceased to be subject to military law was justified because it was done under an order which was given while they were subject to military law. There is no provision in the Army Act, 1881, under which an officer can order a man not subject to military law to be taken into the custody of civilians and handed over to the civil authority. Therefore the taking into custody of the plaintiff by the defendants at Shorncliffe Station when they had ceased to be subject to military law was illegal. Even if the custody was lawful while the corps was returning as a corps in the train, it certainly was not lawful after the corps was dismissed at Boxmoor Station, and while the defendants were taking the plaintiff to Hemel Hempstead. They were then mere civilians. The military custody contemplated by the Army Act, 1881, is that of a regular soldier, or at any rate that of a person subject to military law. Mere civilians cannot be the agents of military custody. See the definition of military custody in s. 45, sub-s. 2, of the Army Act, 1881, and Section VI. article 29 of the Queen's Regulations. Sect. 158 of the Army Act, 1881, does not justify what the defendants did, for what that section authorizes is the taking and keeping a person in military custody after he has ceased to be subject to military law; and that section only

(1) It was also argued that the damages were excessive; but the arguments on that point are not given, as no question of law was involved.

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applies where an offence against military law has been in fact committed, which was not the case here.

Assuming that the orders given by the adjutant were ultra vires, it is submitted that the defendants cannot justify under them. The test whether a person can justify acting on such an order cannot on principle be whether the order was or was not obviously illegal, or whether the person giving or the person acting on it bonâ fide believed it to be legal. The answer to such questions would be most uncertain. The only test is whether the order was in fact legal: *Warden* v. *Bailey* (1); *Margate Pier Co.* v. *Hannam.* (2)

*Lawson Walton, Q.C.*, in reply. The plaintiff and the defendants were not mere civilians on leaving the camp at Shorncliffe. The regiment proceeded as a regiment in the train to Boxmoor Station, and, though the other members of the corps were then dismissed, the defendants were not dismissed from military duties till they had delivered the plaintiff to the police authorities at Hemel Hempstead. The custody of the plaintiff by the defendants was all along military custody within the meaning of s. 158. Sect. 21 of the Volunteer Act, 1863, provides for giving a volunteer into the custody of another volunteer while they are under arms or on duty, and such custody is clearly not civil custody. [He cited *Dews* v. *Riley.* (3)]

*Cur. adv. vult.*

May 7. A. L. SMITH L.J. read the following judgment:— This is an action for false imprisonment brought by the plaintiff, who was a private in the Bedfordshire Regiment of Volunteers, against three of his comrades in the same regiment (a lance-corporal and two privates), and also against a police superintendent of the Herts County Constabulary. The superintendent has succeeded in the action, for he shewed to the satisfaction of the jury that he had reasonable cause for suspecting that a felony had been committed by the plaintiff, but, as the other three defendants were unable to shew that a felony had in fact been committed, for the plaintiff had been acquitted at quarter

(1) (1811) 4 Taunt. 67. (2) (1819) 3 B. & A. 266.
(3) (1851) 11 C. B. 434.

sessions, it was held by the learned judge who tried this case that, as the three defendants were mere civilians when they did what is complained of, they were consequently undefended, and they have had damages assessed against them by the jury to the amount of 300*l*. The three defendants, with the aid of the War Office, appeal, and the questions are whether they have a good defence to this action upon the ground that they were not civilians but were soldiers under military law when they did the act which is charged against them, and, if not, whether the damages are so excessive that a new trial should be ordered as regards them.

The material facts are these. Upon Saturday, August 8, 1896, the plaintiff and the three defendants were quartered with their regiment, the 2nd Bedfordshire Volunteers, in camp at Shorncliffe, training and exercising there with a portion of Her Majesty's regular forces. This volunteer regiment had gone into camp on the previous Saturday under an order of the War Office dated April 22, 1896, for "the formation of the Home Counties Volunteer Brigade at Shorncliffe, August 1 to August 8, 1896." It will be noticed that by the order this camp, as it has been called, began on Saturday, the 1st, and ended on Saturday, August 8, 1896. Upon the morning of Saturday, August 8, 1896, whilst the regiment was still in camp, the plaintiff was accused by some of his comrades of having stolen certain articles belonging to them. Captain Foote, of the Royal Inniskillings, who was adjutant of the regiment and in charge of the volunteer battalion, was called up to the tent where the felony was supposed to have been committed, and, having investigated the matter, ordered the plaintiff under arrest and into the custody of one of the volunteers present, to be taken to the Shorncliffe Railway Station with the baggage guard of the regiment; and he ordered that the plaintiff should be taken under escort and arrest in the special military train which on that day was about to take the regiment to Boxmoor Station; and he also ordered that upon arrival there the plaintiff should be taken under arrest and handed over to the police authority at Hemel Hempstead, which is about two miles from the Boxmoor Station and is the plaintiff's home. Under the

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order of Captain Foote the plaintiff was placed under arrest and into the custody of one of the volunteers of his regiment, and was so taken to the Shorncliffe Station with the baggage guard of the regiment, the plaintiff as well as the volunteer who held him under arrest being in uniform and under arms. Shortly after the plaintiff reached the Shorncliffe Station the regiment under arms and under command arrived there with the three defendants in the ranks. They were then told off and ordered by their superior officer, pursuant to the order of Captain Foote, to escort the plaintiff under arrest in the special military train about to start for Boxmoor, and upon arrival there to take him under arrest to Hemel Hempstead and hand him over to the police authorities there. This order the three defendants obeyed, both they and the plaintiff being all the time in uniform and under arms. The regiment, which had formed up in marching order in camp at Shorncliffe, was not dismissed until after its arrival at the Boxmoor Station, and the three defendants were not dismissed until the orders of Captain Foote had been carried out and the plaintiff handed over to the police authority at Hemel Hempstead, to which place they had marched the plaintiff from Boxmoor Station in uniform and under arms by a side road from the station.

The learned judge, against whose judgment, as also against the verdict of the jury as to damages, the three defendants appeal, has entered judgment for the plaintiff for 300*l.*, having first amended the statement of claim, which claimed 200*l.*, by altering the claim into one for 300*l.*, the result being that these three defendants, who are working men and of the same rank of life as the plaintiff (he being a working tailor and the others journeymen painters and a carpenter), have been mulcted in the sum of 300*l.* for simply obeying the orders of their superior officer. If they had disobeyed those orders they would, I apprehend, have found themselves in a perilous position by reason of s. 21 of the Volunteer Act, 1863, and of s. 20 of the Army Act, 1881.

I now proceed to inquire whether the law is such as to sanction a judgment for false imprisonment at all, no matter for what damages, against the three defendants in the above circumstances.

There can be no possible doubt that upon the morning of August 8, 1896, Captain Foote, in the camp at Shorncliffe, gave a lawful order concerning "a soldier" engaged in military service for a military offence. The offence for which the plaintiff was placed under arrest was cognisable by either military or civil authority. That the plaintiff, when the order was given, was a soldier subject to military law is beyond dispute. Sect. 176 of the Army Act, 1881 (44 & 45 Vict. c. 58), and article 374 of the Regulations for the Volunteer Forces, are conclusive as to this. But it is argued for the plaintiff that, although this might be so, the order to the three defendants given at the Shorncliffe Station by their superior officer pursuant to the order of Captain Foote to escort the plaintiff under arrest with his regiment from Shorncliffe Station to Hemel Hempstead was illegal, because the plaintiff and the three defendants had then ceased to be subject to military law and had become civilians, which, it is said, they became immediately they left the camp, and that, therefore, the three defendants could only justify imprisoning—that is, escorting the plaintiff under arrest pursuant to orders from Shorncliffe Station to Hemel Hempstead—by proving that a felony had, in fact, been committed, and that they had reasonable cause for suspecting that the plaintiff had been guilty of it, and this fact the three defendants had failed to establish.

Now, first of all, did these four men—that is, the plaintiff and the three defendants—become civilians, either when they left the camp in the circumstances in which they left it or when they left the Shorncliffe Station with the regiment, all being in uniform under arms, and under command in the military train? It has been held by the learned judge that upon the true construction of the statutes they became civilians when they left the Shorncliffe Camp, and it is argued that, as Captain Foote had only a jurisdiction limited to such time as military law existed, the three defendants cannot justify under an order which, though good so far as the primary arrest was concerned, was bad so far as it ordered the keeping of the plaintiff under arrest, for, as to this, it was in excess of jurisdiction. In my opinion the War Office order of April 22,

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1896, above referred to, covered and included the whole of Saturday, August 8, 1896. It was argued that it did not. Inasmuch as it must be conceded that the order covered some part of the day, what part of it did it cover, if it did not cover the whole day? No answer was given to this. In my opinion the order covered and included the whole of Saturday, August 8, in the same way as it covered the whole of Saturday, August 1, 1896. So soon as the Bedfordshire Volunteers fell in under arms and under command on that day as a regiment to proceed to the camp at Shorncliffe to take part in military training there with regulars, in my opinion from that time they became subject to military law, and remained so subject until they were dismissed upon Saturday, August 8, 1896. I can find in the War Office order no fraction or part of a day as distinct from the whole day as being only covered by the order; but, on the contrary, I find that, by art. 573 of the Regulations for the Volunteer Forces, an additional allowance of 4*s.* per day is granted to a volunteer private to cover time occupied in joining and quitting camp, which points to the day being entire. If the Bedfordshire regiment of volunteers had remained in camp at Shorncliffe the whole of the 8th, during the whole of that day it would have formed part of the Home Counties Volunteer Brigade at training and exercise with regulars, even though during that day the regular forces might have been leaving the camp, and the camp itself was being dismantled. If all the regulars had left the camp on the morning of the 8th, leaving the Bedfordshire Regiment still in camp, can it be said that the regiment did not continue under military law whilst it remained in camp? I heard no suggestion in argument that the regiment became a regiment of civilians whilst in camp. Then what becomes of the argument of the learned counsel for the plaintiff that the regiment became a regiment of civilians, though under arms and under command, the moment it became a unit by itself. If the regiment had been dismissed in camp and each volunteer had had to find his own way to his home as best as he could, this would have been another matter, but is not the present case.

By s. 176 of the Army Act, 1881, it is enacted that "persons

subject to military law as soldiers" are "non-commissioned officers and men belonging to the volunteer forces of the United Kingdom when they are being trained or exercised with any portion of the regular forces," and by art. 374 of the Regulations for the Volunteer Forces it is provided that "volunteers become subject to military law when they join a camp with regular forces or are assembled for training or exercise with any portion of the regular forces." The question arises, When did this volunteer regiment begin to and cease to be trained or exercised with a portion of the regular forces? In my judgment each member of this regiment became subject to military law when he fell in and formed up at Boxmoor with his comrades as a regiment under arms and under command upon Saturday, August 1, 1896, in order to train and exercise with regular forces at Shorncliffe, and that subjection did not cease so long as it continued to be a regiment under arms and under command—that is, until it and its component parts were dismissed from being any longer under arms upon August 8. In my judgment the training or exercise of a regiment under arms and command to carry out efficiently what is called "entraining" and "detraining" is a military exercise, and constitutes part and parcel of the forming as well as the unforming of a camp, and is as much a military training or exercise as the formation of a regiment into square or of a company in fours, or the bringing about of any other military manœuvre. I cannot agree with the learned judge that the plaintiff and the three defendants became mere civilians upon leaving Shorncliffe Station with their comrades as a regiment under arms in the special military train; but I should add that it does not appear that the War Office order of April 22, 1896, was called to his attention as it has been to ours in this Court. But there is another section of the Army Act, 1881, which, in my judgment, is fatal to the plaintiff's case. It is s. 158. By it it is enacted that "where an offence under this Act has been committed by any person while subject to military law such person may be taken into and kept in military custody and tried and punished for such offence, although he or the corps or battalion to which he belongs has ceased to be subject to military law, in like

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manner as he might have been taken into and kept in military custody, tried, or punished if he or such corps or battalion had continued so subject." This section, to my mind, obviously means where an offence is alleged to have been committed, and indeed the learned counsel for the plaintiff had to admit that it would be absurd to construe the section in any other way, for otherwise the jurisdiction under it to try could only arise if, after trial, the prisoner was convicted, which, with all respect to the draftsman of the section, is ridiculous. It is clear that the plaintiff whilst subject to military law was taken into and placed in custody for an offence under the Act. But it is said that this only applies to and justifies the keeping in military custody, and not the keeping in civilian custody, which the defendants are charged with having done in the present case after leaving Shorncliffe Station. I have already said what I have to say about the continuance of military law in this case. But it is argued that military custody means the custody of a regular soldier only, which custody is defined by s. 45 of the Army Act, 1881, thus: "Military custody means according to the usages of the service the putting the offender under arrest or the putting him in confinement"; and by Section VI. art. 29 of the Queen's Regulations, "military custody in the case of a private soldier means confinement under charge of a guard, picket, patrol, or sentry, or of a provost marshal"; and it is said that military custody therefore means the custody by a regular soldier. In considering what is military custody when dealing with a volunteer s. 21 of the Volunteer Act must be looked to as well as the Army Act, 1881. This section, in addition to empowering the commanding officer of a volunteer corps to "discharge from the corps any volunteer . . . . for disobedience of orders by him while doing any military duty with his corps" enacts that "if any volunteer while under arms or on march or duty with the corps . . . . or while wearing the clothing or accoutrements of such corps and going to or returning from any place of exercise or assembly of such corps . . . . disobeys any lawful order of any officer . . . . or is guilty of misconduct, the officer then in command . . . . may order the offender, if an officer, into arrest, and, if not an

officer, into custody of any volunteer belonging to the corps, . . . . but so that the offender be not kept in such arrest or custody longer than" the time prescribed by this section. Now is this civil or military custody? There can be but one answer. It is not civil; it is therefore military. I can see no sense or reason for holding that the custody in which the plaintiff was from Shorncliffe Camp to Hemel Hempstead police station was not military custody, which in my judgment it was, and consequently s. 158 of the Army Act, 1881, also avails the three defendants.

There is yet another ground upon which it appears to me, if it were necessary to resort to it, that this case ought to be decided adversely to the plaintiff, and it is this. By s. 43 of the Army Act, 1881, it is enacted under the heading of "Redress of Wrongs" as follows: "If any soldier thinks himself wronged in any matter . . . . by any soldier he may complain thereof to his captain, and, if he thinks himself wronged by his captain either in respect of his complaint not being redressed, or in respect of any other matter, he may complain thereof to his commanding officer; and, if he thinks himself wronged by his commanding officer, either in respect of his complaint not being redressed or in respect of any other matter, he may complain thereof to the general or other officer commanding the district or station where the soldier is serving; and every officer to whom a complaint is made in pursuance of this section shall cause such complaint to be inquired into, and shall, if on inquiry he is satisfied of the justice of the complaint so made, take such steps as may be necessary for giving full redress to the complainant in respect of the matter complained of." For the reasons above given, in my opinion the plaintiff and the three defendants were soldiers under military law between Shorncliffe Camp and Hemel Hempstead, and this section therefore applies to the plaintiff. I find in the judgment of Lush J. in *Dawkins* v. *Lord Paulet* (1) some remarks in connection with the articles of war, of which this section is the equivalent, which appear to me to be such sound sense and good law that I will repeat them. He says: "Can it be

(1) L. R. 5 Q. B. at p. 121.

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reasonably inferred that any other mode or measure of redress was intended by the Act than that which is specified in this article? It is no argument to say that the remedy is imperfect because no pecuniary compensation is given to the injured party. That defect, if it be one, is a defect in the code itself which we cannot remedy. The plaintiff has no reason to complain, for he has all which the law military, to which he engaged to submit when he entered the service, entitles him to have. The same code creates both the right and the remedy, and this Court cannot add to the one or to the other." This statement of Lush J. in my judgment applies to the present plaintiff, and if there were no other ground adverse to him I think it suffices to put an end to this unseemly action against the three defendants, and I entirely agree with what that learned judge said. I need not refer to passages which may also be found in the judgment of Willes J. in the case of *Keighly* v. *Bell* (1) and in *Dawkins* v. *Lord Rokeby* (2), shewing that the civil courts cannot be invoked to redress grievances arising between persons both subject to military law. For the reasons I have given I think that the plaintiff's action fails.

In regard to the damages being excessive, I need say nothing except that in my judgment as against these three defendants they were so excessive that I think a new trial should have been ordered upon this ground, if it were necessary to have done so. I do not doubt that the jury have heaped upon the shoulders of the three defendants damages which Frogley, the police superintendent, might possibly have had to bear and for which the three defendants were not liable, had he not succeeded, as he did, under his plea of justification. But what I might have to say as to this, in the view I take of this case, is now immaterial. For the reasons above, in my opinion, the appeal should be allowed and judgment entered for the three defendants with costs here and below.

CHITTY L.J. read the following judgment:—The original arrest of the plaintiff within the actual boundaries of the camp at Shorncliffe by order of the adjutant then acting in

(1) 4 F. & F. 763. (2) 4 F. & F. 806.

command of the volunteer battalion in which the plaintiff was then serving as a private was unquestionably valid and justifiable in law. This proposition was not and could not be denied by the plaintiff's counsel. In the language of the 176th section of the Army Act, 1881, the plaintiff was then "subject to military law as a soldier." His battalion was then being trained or exercised with a portion of the regular forces of the Crown, and was attached to or otherwise acting as part of or with such regular forces. The man into whose charge he was committed when first placed under arrest was a member of his corps, and was himself also subject to military law as a soldier. The offence with which the plaintiff was charged was a military offence as well also as a crime for which he might have been indicted under the ordinary law. All that was done subsequently down to the marching of the plaintiff under escort to the police station at Hemel Hempstead was done in execution of the order given by the adjutant in the camp. The plaintiff's three comrades, members of the same corps, against whom the judgment under appeal was given were acting throughout in obedience to the original order transmitted to them at Shorncliffe Station in the usual military manner through subordinate officers who were their superiors, and whom they were bound to obey.

The question is at what point of time and space this military status of the plaintiff and his three comrades ceased. The learned judge has held that it ceased upon their departure from the camp at Shorncliffe, and that thereupon their status became that of civilians, subject only as to discipline to the provisions of the Volunteer Act, 1863, and subsequent statutes relating to volunteers. He held that the training and exercise mentioned in the 176th section of the Army Act, 1881, then came to an end, and that such training and exercise did not include the proceeding to or from the camp itself. In the argument on the appeal the plaintiff's counsel supported these propositions. He further argued that, if the status of the plaintiff and his three comrades was not changed on their departure from the camp, it became changed when they reached Shorncliffe Station; and, if not then, when they reached Boxmoor Station; and, if not then, at all events before they reached the police station.

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Now, in my opinion, there are upon the admitted facts two points only at which it can be reasonably argued that the change of status took place, namely, the departure from the camp and the arrival at the police station. In my judgment the change did not take place until the plaintiff and his three comrades reached the police station and the plaintiff was given in charge of the police.

It was not contested that the plaintiff was and remained under lawful military arrest until he came to the boundary of the camp. But it is said that the transition took place immediately the boundary was passed. The argument, if well founded, presents a curious result. As the volunteer battalion was marching out of camp, so much of it as had crossed the boundary would be civilians subject to volunteer discipline only; so much as had not crossed the line would remain subject to military law as soldiers. According to the argument, each individual man as he steps over the line changes his status though he forms part of a battalion under arms and in marching order. However curious and anomalous this result may seem, still it must be submitted to, if it is the true result of the Act of Parliament as applied to the facts.

An important factor in this case is the order of April 22, 1896, which seems to have been lost sight of in the Court below, and to which it would appear the attention of the learned judge was not called. It is headed "Home District Orders. Horse Guards, Whitehall." It runs thus: "Referring to paragraph 275 of the Volunteer Regulations, 1895, sanction is hereby given under authority dated War Office, 16th April, 1896, No. V.; Camps; 3578, to the formation of the Home Counties Volunteer Brigade at Shorncliffe, 1st to 8th August, 1896. The commanding officers have been informed accordingly. By Order." It was signed by the proper authority. The order is for the formation of a brigade, and not merely of a camp. In point of time it extended from the 1st to the 8th day of August, both inclusive. It covered the whole of the 8th August, the day on which the plaintiff was taken to the police station. Under the 573rd of the Regulations for the Volunteer Force an additional allowance of 8*s*. for every officer and of 4*s*. for every man of other rank is made to cover the time occupied in joining

and quitting a camp, where the volunteer's attendance at the camp reckons towards qualifying him for the efficiency capitation grant. This regulation is also of importance. It provides a payment in respect of joining and quitting the camp.

The brigade was formed and constituted by the War Office order already stated. Now, I take it that the military authority of the officer appointed to command the brigade covered the whole period of the eight days. It would be within the scope of his authority to direct the commanding officers of the various volunteer battalions, who had signified their intention of forming part of the brigade, by what route they should march into and from camp. In practice probably in small brigades he leaves the arrangements as to the route to the discretion of the officers commanding the battalions. But the 176th section applies equally to the assembling of a larger body than a mere brigade, consisting of from two to four battalions. It applies to a division or an army corps. The greater the number of the battalions and troops of all arms, including artillery, cavalry, and artillery volunteers, and regulars, the greater would be the necessity for prescribing the routes by which the various bodies should march to and from the place where they were ultimately to be assembled, and the times of their marching, and other like details; and I consider that all such details would constitute an essential part of the training.

I come now to the critical point of the case. When did the training or exercise of the corps or company, to which the plaintiff belonged, with a portion of the regular forces, begin and end? In my opinion it began at the time when the corps or company fell in under arms in military formation for the purpose of marching to and being conveyed by the special military train to Shorncliffe, and it ended as to the corps or company other than the plaintiff and his three comrades when, having reached their homeward destination, they were finally dismissed; and it ended as to the plaintiff and his three comrades when they had reached the police station, and the plaintiff was taken in charge by the inspector and his three comrades were dismissed. In my opinion it makes no difference whether the march to and from the place where the different battalions form part of the brigade or larger body is long or short, or

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whether it is performed wholly or partly on foot or by railway train, or any other mode of conveyance. In this case the homeward march was performed partly by conveyance in the railway train. The getting into and out of the train in military order and formation, technically called "entraining" and "detraining," is an important part of military duty and exercise. The training and exercise mentioned in the 176th section cannot be reasonably restricted to what is actually done in the presence of the regular force. If at any time during the eight days the plaintiff's battalion had been marched out of the camp, and had been drilled, or put through evolutions, they would still be training with the regular troops, although all the regular troops had remained in camp, or had been marched out in some other direction for temporary separate exercise. I can find no sufficient reason for confining the training or exercise to training or exercise in or at or near the camp itself. The object and the effect of the section is to place the whole force, composed of regulars and volunteers, under one and the same military law during the period to which the training extends. The Act ought in my opinion to be so construed as to afford a safe, practical, and working rule for the officers and men under arms.

I think it unnecessary to go over again all the other sections of the Acts and the various regulations which the Lord Justice has fully dealt with. But the 158th section of the Army Act, 1881, requires special notice. The section opens with the words, "where an offence under this Act has been committed by any person while subject to military law." These words constitute a condition precedent to all that follows. The section continues: "Such person may be taken into and kept in military custody, and tried, and punished for such offence, although he or the corps or battalion to which he belongs has ceased to be subject to military law in like manner as he might have been taken into and kept in military custody, tried, or punished, if he or such corps or battalion had continued so subject." The learned judge has taken the words of the condition literally, and has held that the offence must have been actually committed. I am unable so to read the condition. So to read it in my opinion not only reduces the section to a palpable absurdity, but renders it meaningless. In some impossible manner it

must be shewn that the offence has been committed by the person before he can be put upon his trial for the offence. It is manifest that the words "alleged to have been committed" must be read into the condition in order to give it any meaning at all.

The result in my opinion is that the defence has been established, and the acts of the defendants are justified in law. The grievances of which the plaintiff complains are grievances suffered by him when subject to military law at the hands of persons also subject to military law in execution of their military duty. To these grievances the 43rd section of the Army Act, 1881, applies, and for them the plaintiff must seek redress in accordance with the section. The Court cannot add to the remedy which is thus provided. It is the plaintiff's only mode of seeking redress.

As the action fails there is no question in reference to the damages. But in my opinion they were monstrous in amount, and would have justified us in directing a new trial on the ground of their being excessive. The plaintiff's comrades put no indignity upon him; they did not even deprive him of his rifle. His only complaint against them, apart from the question of law, seems to be that they did not speak to him when in the train. The only probable explanation of the amount of damages is that the jury in mistaken sympathy with the plaintiff, who was acquitted on his trial, heaped upon the three defendants all the consequences that followed after his being given into custody at the police station. I add that, had the law been otherwise than as above stated, it would in my opinion have proved detrimental to the true interests of the volunteer force.

COLLINS L.J. concurred.

*Appeal allowed.*

Solicitor for plaintiff: *Lathom.*

Solicitors for defendants: *J. N. Mason & Co., for Sworder & Longmore, Hertford.*

E. L.

END OF VOL. I.

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Sect. 19 of the Arbitration Act, 1889, impliedly confers on a party to an arbitration the right, at any stage of the proceedings, to apply to the Court for an order directing the arbitrator to state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

If a party to an arbitration, acting bonâ fide, requests the arbitrator on reasonable grounds either to state a special case for the opinion of the Court upon some questions so arising and material for consideration, or to delay his award until the party can himself apply to the Court for an order directing a special case, and the arbitrator refuses to comply with the request, or by summarily making his award attempts to preclude the party from applying, the arbitrator is primâ facie guilty of a breach of duty towards that party. But if the application is frivolous and made merely for the purpose of delay, the arbitrator will be right in refusing it, and will be upheld by the Court if he does so.

A breach of duty of this character is primâ facie misconduct on the part of an arbitrator within the meaning of s. 11 of the Act of 1889, and justifies the Court, even after an award has been completed, in setting it aside under s. 11, sub-s. 2, or in remitting it for reconsideration under s. 10, sub-s. 1.

This view of the law is consistent with *Dinn* v. *Blake*, (1875) L. R. 10 C. P. 388, and *In re Keighley, Maxsted & Co. and Durant & Co.*, [1893] 1 Q. B. 405.

In this case, on the ground of misconduct of that character by the arbitrators, a completed award was remitted to them with a direction that they should reconsider it, and state whether there was a deficiency in the quantity of a cargo of wheat delivered at a port of discharge, and, if there was, then to state a special case. *In re* PALMER & CO. AND HOSKEN & CO. - C. A. 131

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A mortgage of debts due to the mortgagor, made in the ordinary form with a proviso for redemption and reassignment upon repayment to the mortgagor, is "an absolute assignment (not purporting to be by way of charge only)" within s. 25, sub-s. 6, of the Judicature Act, 1873.

*Tancred* v. *Delagoa Bay and East Africa Railway*, (1889) 23 Q. B. D. 239, approved.

Where there is an absolute assignment of a debt, but by way of security, a right to a reassignment on redemption will be implied, and s. 25, sub-s. 6, of the Judicature Act, 1873, is applicable to such an assignment.

*Quære*, whether an assignment of part of an entire debt is within the enactment.

Judgment of Lord Coleridge C.J., in *Brice* v. *Bannister*, (1878) 3 Q. B. D. 569, questioned.

A firm of builders delivered to the plaintiffs a document in the following terms: "*Re* Building Contract, South Lambeth Road.—In consideration of money advanced from time to time we hereby charge the sum of 1080*l.*, which will become due to us from John Robertson on the completion of the above buildings, as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you." The plaintiffs gave notice to the John Robertson named in the document, and brought this action against him to recover the amount:—

*Held*, that the document was not "an absolute assignment (not purporting to be by way of charge only)" within s. 25, sub-s. 6, of the Judicature Act, 1873, and that the plaintiffs could not recover in the action. DURHAM BROTHERS *v.* ROBERTSON C. A. 765

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An adjournment of the hearing of an application to set aside a bankruptcy notice cannot be granted to the judgment debtor, unless, upon the application for adjournment, sufficient ground, within s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, and Rules 138 (2), 139, and Form 8, of the Bankruptcy Rules, 1886 and 1890, is shewn for setting aside the bankruptcy notice. *In re* COLE. *Ex parte* ATTENBOROUGH - Div. Ct. 290

2. —— *Bankruptcy Notice — Judgment — Equitable Assignment of Judgment Debt—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 1.

A judgment creditor, who has made an equitable assignment of the judgment debt, may nevertheless issue a bankruptcy notice upon the judgment under the Bankruptcy Act, 1883, s. 4, sub-s. 1 (*g*). *In re* PALMER. *Ex parte* BRIMS C. A. 419

3. —— *Bankruptcy Notice—Scottish Judgment registered in England—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*)—*Judgments Extension Act*, 1868 (31 & 32 *Vict. c.* 54), *ss.* 3, 4.

A judgment of the Court of Session in Scotland registered in England under the Judgments Extension Act, 1868, cannot be made the foundation of a bankruptcy notice.

*In re Watson*, [1893] 1 Q. B. 21, followed. *In re* A. BANKRUPTCY NOTICE - C. A. 383

4. —— *Costs—Taxation — County Court—Power of Board of Trade to Review—Practice—Costs of Stranger to the Bankruptcy—Bankruptcy Rules*, 1886 *and* 1890, *r.* 124—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 73, *sub-s.* 3.

Rule 124 of the Bankruptcy Rules, 1886 and 1890, which empowers the Board of Trade to have "any bill of costs, charges, fees or disbursements of any solicitor, manager, accountant, auctioneer, broker, or other person," which has been taxed by a registrar of a county court, reviewed by a bankruptcy taxing master of the High Court, does not apply to persons litigating with the trustee outside the bankruptcy, but is confined to the class of persons enumerated in the rule and employed by the trustee in the bankruptcy. *In re* HUNT. *Ex parte* BOARD OF TRADE - - - - Wright J. 287

5. —— *Execution—Sheriff—Notice of Bankruptcy Petition—Service—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-s.* 2—*Bankruptcy Rules*, 1886, *r.* 90.

Rule 90 of the Bankruptcy Rules, 1886, which provides that service of notices, orders, or other proceedings shall be effected before the hour of six in the afternoon, except on Saturdays, when it shall be effected before the hour of two in the afternoon, does not apply to the notice to the sheriff of a bankruptcy petition mentioned by s. 11, sub-s. 2, of the Bankruptcy Act, 1890.

Therefore, where a sheriff to whom money had been paid by an execution debtor in order to avoid a sale under an execution upon a judgment **BANKRUPTCY**—*continued.*

for more than 20*l.* was, after two in the afternoon of the fourteenth day after the payment, being a Saturday, served with notice of a bankruptcy petition upon which a receiving order was made against the debtor:—

*Held*, that the sheriff must pay the balance of the money so paid, after deducting his costs, to the official receiver. LOLE *v.* BETTERIDGE C. A. 256

6. —— *Proof — "Debt provable in Bankruptcy"—Debt incurred after Notice to Creditor of Act of Bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 37.

Where a debt has been incurred by a bankrupt before the date of the receiving order, but after notice to the creditor of an act of bankruptcy available against the debtor, an action for the debt cannot be maintained, it being a debt provable in bankruptcy within the meaning of the Bankruptcy Act, 1883, s. 37, sub-s. 3, although by sub-s. 2 of that section the creditor is subject to a personal disqualification for proving it. BUCKWELL *v.* NORMAN - - C. A. 622

7. —— *Receiving Order—Rescission—Arrangement with Creditors—Discretion—Bankruptcy Act* 1883 (46 & 47 *Vict. c.* 52), *s.* 104—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 3, *sub-s.* 6.

In the exercise of the general discretion given to a Court of Bankruptcy by s. 104 of the Bankruptcy Act, 1883, to rescind its orders, the Court may rescind a receiving order where an arrangement is, subsequently to the making of the order, effected by the debtor with his creditors otherwise than in pursuance of the provisions of s. 3 of the Bankruptcy Act, 1890, though the Court will only do so with great caution and under special circumstances which make it quite clear that the arrangement is for the benefit of the creditors, and the debtor has not been guilty of misconduct in connection with his insolvency.

So *held* by A. L. Smith L.J. and Collins L.J., Rigby L.J. dissenting. *In re* IZOD. *Ex parte* THE OFFICIAL RECEIVER - - C. A. 241

8. —— *Receiving Order in lieu of Committal —Jurisdiction — Judgment Debtor—Foreigner—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-s.* 1 (*d*); *s.* 103, *sub-s.* 5—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.

Where there is jurisdiction to commit a judgment debtor under s. 5 of the Debtors Act, 1869, there is jurisdiction under the Bankruptcy Act, 1883, s. 103, sub-s. 5, to make a receiving order against him in lieu of committing him, even although he is a foreigner not domiciled in England, and has not within a year ordinarily resided, or had a dwelling-house or place of business in England, and consequently a bankruptcy petition could not be presented against him by reason of the provisions of s. 6, sub-s. 1 (*d*), of the Bankruptcy Act, 1883. *In re* CLARK. *Ex parte* CLARK - - - C. A. 20

9. —— *Reputed Ownership—Assignment of Debt—Bill of Exchange—Custom of Trade—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52).

Bankrupts had, prior to their bankruptcy, sold and consigned goods to customers in Spain on the terms that the customers were to have six months' credit from the date of the invoice, and

**BANKRUPTCY**—*continued.*

on the expiration of the first three months, but not before, were bound to accept the bankrupts' drafts at three months for the price of the goods. The bankrupts, on making the consignments, obtained advances from bankers upon the following terms, namely, that they should draw for the price of the goods upon their customers in Spain at six months from the date of the invoice, and hand the draft to the bankers, and, when the period of three months from the date of the invoice arrived, they should draw a bill of exchange upon the customer for the price of the goods, and hand the bill to the bankers for them to get it accepted by the customer, and, when the bill was met, the unaccepted draft at six months should be handed back to the bankrupts. The bankrupts, in pursuance of this arrangement, drew and handed to the bankers drafts for the prices of goods sold and consigned to customers in Spain at six months from the date of the invoice, and at the commencement of the bankruptcy these drafts were in the hands of the bankers unaccepted and no notice of the transaction between them and the bankrupts had been given to the customers:—

*Held*, that the debts owing by the Spanish customers to the bankrupts were at the commencement of the bankruptcy in the order and disposition of the bankrupts, in their trade, by the consent and permission of the true owners under such circumstances that the bankrupts were the reputed owners thereof.

A custom of trade by which goods are left in the possession of persons to whom they do not belong must, in order to exclude the doctrine of reputed ownership, be a custom known in business generally, and not merely to persons dealing in a particular market. *In re* GOETZ, JONAS & Co. *Ex parte* THE TRUSTEE - - **C. A. 787**

10. —— *Retainer—Insolvent Testator—Debt due to Executor—Retainer in Specie—Administration Order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 125, *sub-ss.* 1, 9.

When the debt due to the executor of an insolvent testator exceeds the value of the testator's assets, the executor is not bound to realize the assets, i.e., convert them into money, before exercising his right of retainer, but is entitled to retain the assets in specie in satisfaction of his debt.

*Woodward* v. *Darcy*, (1557) 1 Plow. 184, and *Chapman* v. *Turner*, (1738) 9 Mod. 268; S. C. Vin. Abr. Exor. D. 2, p. 72, discussed. *In re* GILBERT. *Ex parte* GILBERT - **Wright J. 282**

11. —— *Secured Creditor—Omission to value Security—Inadvertence—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Sched. I., rule* 10; *Sched. II., rules* 11, 12, 13.

A secured creditor of a bankrupt who mentions his security in his proof, and states that it is worthless, does not omit to value his security within the meaning of the Bankruptcy Act, 1883, Sched. I., rule 10:—

So *held* by the Court of Appeal (A. L. Smith L.J. and Chitty L.J., Collins L.J. doubting).

Where a creditor omits to value his security by reason of erroneous information leading him to suppose it to be worthless, there is not an omission

**BANKRUPTCY**—*continued.*

to value the security which arises from inadvertence within the meaning of the Bankruptcy Act, 1883, Sched. I., rule 10. *In re* PIERS. *Ex parte* PIERS - - - - - **C. A. 627**

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A bastard child having been born in September, 1896, the mother on October 21, 1896, made three separate applications to three different justices for a bastardy summons against the defendant, but as she was at that time unable to find him the issue of the summons was suspended. In July, 1897, the mother, having found the defendant, procured one of the three justices to issue his summons upon the application so made to him on October 21, 1896. On November 3, 1897, that summons was heard, and dismissed on the ground that the evidence was insufficient. On November 17, 1897, she procured another of the three justices to issue a further summons against the defendant, which summons purported to be founded on the application to the said justice of October 21, 1896. The summons was heard and a bastardy order made:—

*Held*, that the three applications made on October 21, 1896, were in substance but one application, and were exhausted by the hearing and dismissal of the summons on November 3, 1897, and that the order was consequently made without jurisdiction. REG. *v.* ROBINSON **Div. Ct. 734**

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**BETTING** — "Place used for" — Archway in street - - - - **875**
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**BILL OF EXCHANGE**—*Consideration, Action on —Bill coming into Hands of Plaintiff after Action brought.*

Where a buyer of goods has given a bill of exchange for the price, an action will not lie for the price, even after dishonour of the bill, if at the date of the commencement of the action the bill is outstanding in the hands of a third party.

**BILL OF EXCHANGE**—*continued.*
It is not enough to entitle the plaintiff to succeed that he is in possession of the bill at the date of the trial. DAVIS *v.* REILLY - - Div. Ct. 1

2. —— *Notice of Dishonour—Bank with several Branches — Notice to wrong Branch—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 49, *sub-ss.* 12 (*b*), 13.

A branch of a country banking company received from a customer a bill of exchange and forwarded it to a London bank for presentation. The bill was dishonoured, and the London bank on the following day sent notice of dishonour by post to a branch of the country banking company, but not to the branch from which they had received the bill. On the next day they discovered the mistake, and telegraphed notice of dishonour to the branch from which they had received the bill. The notice given by that branch, and all subsequent notices, including that to the defendant, who was an indorser of the bill, were sent in due time. In an action by the holder of the bill:—

*Held*, by A. L. Smith and Rigby L.JJ., Collins L.J. dissenting, that sufficient notice of dishonour had been sent by the London bank to comply with the provisions of s. 49, sub-ss. 12, 13, of the Bills of Exchange Act, 1882.

*Held*, by Collins L.J., that for the purpose of notice of dishonour the branches of a bank must be regarded as distinct, that the written notice by the London bank, not having been sent to their principals, was ineffective, and could not be made effective by the telegram, which was out of time. FIELDING & CO. *v.* CORRY - C. A. 268

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—— Incorporation of conditions of charterparty—Freight - - - - 150
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—— Implied warranty—Bullion-room—Fitness to resist thieves - - - 567
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**BILL OF SALE**—*Execution—Sale of Goods by Sheriff—Rules of the Supreme Court, Order* LVII., *r.* 12—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.*,71), *s.* 11.

A debtor gave a bill of sale of goods as security for a loan. The sheriff having taken the goods in execution on behalf of a judgment creditor of the grantor, the grantee gave the sheriff notice of his claim. The sheriff took out an interpleader summons, and on the same day a receiving order in bankruptcy was made against the grantor, and he was afterwards adjudged bankrupt. The official receiver did not claim the goods under the Bankruptcy Act, 1890, s. 11, but appeared on the hearing of the interpleader summons and concurred with the judgment creditor in asking for a sale under Order LVII., r. 12, and an order for the sale was accordingly made. It appeared on the evidence that the sale of the goods by the sheriff was not likely to produce enough to pay what was due on the bill of sale:—

*Held*, that, assuming Order LVII., r. 12, not to be defeated by s. 11 of the Bankruptcy Act, 1890, a sale ought not to be ordered, and that as it was very doubtful whether the goods would realize enough to pay the bill of sale holder, and neither the official receiver nor the judgment creditor were willing to redeem or to give a guarantee against loss if the proceeds of sale proved insufficient, the proper course was to order the sheriff to withdraw.

*Semble*, that if the official receiver had asked for the delivery of the goods to him under s. 11 of the Bankruptcy Act, 1890, the operation of Order LVII., r. 12, would have been excluded, but that as he had not so done, but asked for a sale, that rule could be applied. STERN *v.* TEGNER C. A. 37

2. —— *Last Receipt for Rent—Reasonable Excuse for Non-production—Rent Due but not demanded by Landlord—Demand to send Receipt to Grantee by Post—Goods Seized to Realize Security—Relief against Seizure — Jurisdiction to "make such Order as may seem just"—Order as to giving up Bill of Sale—Costs of Levy—Costs of Application—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 7.

The grantee of a bill of sale gave the grantor notice in writing to send by post the last quarter's receipt for rent. The rent had not been paid, the landlord not having demanded it. No receipt having been sent, the grantee seized, and claimed the sum advanced, the whole of the interest secured by the bill of sale, and the costs of the levy. The grantor applied for relief under s. 7 of the Bills of Sale Act, 1882, and the judge at chambers ordered that the grantee should withdraw and give up the bill of sale upon the grantor paying the principal sum with interest to date, but without the costs of the levy, and ordered the grantee to pay the costs of the application. On appeal:—

*Held*, that the grantor had not "without reasonable excuse" failed to produce his last receipt for rent, within the meaning of s. 7, sub-s. 4, of the Bills of Sale Act, 1882.

*Ex parte Cotton*, (1883) 11 Q. B. D. 301, approved.

*Held*, also, by Chitty and Collins L.JJ., that a demand that the last receipt shall be sent to the grantee by post is not a demand to produce the receipt to him within the meaning of s. 7, sub-s. 4, of the Act:—

*Held*, also, that, as the grantee had seized for the purpose of realizing his security, the judge had jurisdiction to order him to withdraw and give up the bill of sale on payment of the principal with interest to date, and, as the seizure was wrongful, to refuse to give him the costs of the levy, and to order him to pay the costs of the application. *Ex parte* WICKENS C. A. 543

3. —— *Validity—Filing of Copy and Affidavit—Date of Execution—Omission from Copy—Insertion in Original and in Affidavit—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 2.

A bill of sale is not void because the copy of

**BILL OF SALE**—*continued.*
the bill of sale, required to be filed by s. 10, sub-s. 2, of the Bills of Sale Act, 1878, leaves the date of the execution of the bill of sale in blank, if the date is truly stated in the original bill of sale, and in the affidavit filed under the same section. THOMAS *v.* ROBERTS. SMITH, CLAIMANT Div. Ct. 657

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—— *Chapman* v. *Turner*, (1738) 9 Mod. 268; S. C. Vin. Abr. Exor. D. 2, p. 71, discussed
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—— *Cotton, Ex parte*, (1883) 11 Q. B. D. 301, approved - - - - 543
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—— *Dinn* v. *Blake*, (1875) L. R. 10 C. P. 388, principle in, applied - - 131
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—— *Holborn Guardians* v. *Chertsey Guardians*, (1885) 15 Q. B. D. 76, followed - 859
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—— *Kent County Council and Council of Sandwich, Ex parte*, [1891] 1 Q. B. 389, not followed - - - - 141
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—— *Marine Insurance Co.* v. *China Transpacific Steamship Co.*, (1886) 11 App. Cas. 573, followed - - - - 722
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—— *Metropolitan Board of Works* v. *Vauxhall Bridge Co.*, (1857) 7 E. & B. 964, overruled - - - - 588
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—— *Munro* v. *Balfour*, [1893] 1 Q. B. 113, followed - - - - 495
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—— *Reg.* v. *Inhabitants of Tipton*, (1842) 3 Q. B. 215, rule in, applied - - 594
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—— *Tancred* v. *Delagoa Bay and East Africa Railway*, (1889) 23 Q. B. D. 239, approved - - - - 765
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—— *Wilding* v. *Bean*, [1891] 1 Q. B. 100, distinguished - - - - 12
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**COMPANY**—*Register of Members—Inspection—Company in Voluntary Liquidation—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 32.

The provisions of s. 32 of the Companies Act, 1862, with regard to the inspection of registers of members do not apply to the case of a company in liquidation. *In re* KENT COALFIELDS SYNDICATE, LIMITED - - - - - C. A. 754

2. —— *Winding-up—Statement of Affairs—Refusal by Director or Officer to submit Statement—Jurisdiction of Court—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 7.

Where an order has been made in a county court for the winding-up of a company, and a director or other officer of the company, having been required by the official receiver to submit to him a statement of the affairs of the company, under s. 7 of the Companies (Winding-up) Act, 1890, has refused to do so, the Court has jurisdiction to order the director or other officer to submit the statement, notwithstanding that s. 7, sub-s. 5, provides that "if any person, without reasonable excuse, makes default in complying with the requirements of this section, he shall be liable to a fine." *In re* NEW PAR CONSOLS, LIMITED - - - - Div. Ct. 573

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**CONSPIRACY**—*Legal Injury—Combination to induce a Person not to employ another—Conspiracy to do an Act not amounting to an actionable Wrong—Employer and Workman.*

A conspiracy to do certain acts (not being criminally punishable) gives a right of action only where the acts agreed to be done, and in fact done, would, had they been without preconcert, have involved a civil injury to the plaintiff, for which he would have had a right of action.

*Kearney* v. *Lloyd*, (1890) 26 L. R. Ir. 268, approved and followed. HUTTLEY *v.* SIMMONS Darling J. 181

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**CONTRACT**—*Abandonment of Contract—Right to sue on quantum meruit—Building on Defendant's Land—Evidence of New Contract.*

The plaintiff, a builder, who had contracted to erect certain buildings on defendant's land for a lump sum, after he had done part of the work, abandoned the contract, and the defendant thereupon completed the buildings.

*Held*, that the plaintiff could not recover from the defendant in respect of the work which he had done as upon a quantum meruit, there being no evidence of any fresh contract to pay for the same.

*Munro* v. *Butt*, (1858) 8 E. & B. 738, followed. SUMPTER *v.* HEDGES - - - **C. A. 673**

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**COUNTY COURT**—*Appeal—Injunction — Action claiming less than 20l. Damages—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.

In an action for trespass in the county court the plaintiff claimed 40*s.* damages and an injunction. The judge having given judgment for the plaintiff for damages and an injunction:—

*Held*, that the defendant might appeal against so much of the judgment as granted the injunction without first obtaining the leave of the judge, notwithstanding the provisions of s. 120 of the County Courts Act, 1888. BRUNE *v.* JAMES **Div. Ct. 417**

2. —— *Appeal — Stamp Objection — County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 164—*Rules of Supreme Court*, 1883, *Order* XXXIX., *r.* 8.

An appeal to the High Court does not lie from the ruling of a county court judge that a document tendered in evidence at the trial of an action before him is sufficiently stamped and admissible. MANDER *v.* RIDGWAY - - **Div. Ct. 501**

3. —— *Appeal from—Non-direction—Practice —County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 120.

The rule that no appeal lies from a county court except upon a point of law taken at the trial applies to the case of an omission by the judge in his summing-up to give the jury proper and necessary directions as to the law. The party desirous of appealing on the ground of such non-direction must take the objection at the time so as to give the judge an opportunity of correcting his direction. CLIFFORD *v.* THAMES IRONWORKS AND SHIPBUILDING COMPANY **Div. Ct. 314**

4. —— *Costs—Security for—Jurisdiction—Remitted Action — Bankruptcy of Plaintiff — Joinder of Trustee—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 94.

Where an action of contract, brought in the High Court, is ordered to be tried in a county court, under s. 65 of the County Courts Act, 1888, and before the plaintiff has lodged the original writ and the order with the registrar of the county court, he becomes bankrupt, and a trustee is appointed, and an order is made joining the trustee as plaintiff in the action, the judge of the county court has no jurisdiction to order the trustee to give security for the costs of the action under s. 94. HEMMING *v.* DAVIES **Div. Ct. 660**

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**CRIMINAL LAW**—*False Pretences—Obtaining Credit by Fraud—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 13, *sub-s.* 1.

The defendant ordered a meal in a restaurant; he made no verbal representation at the time as to his ability to pay, nor was any question asked him with regard to it. After the meal he said that he was unable to pay, and that he had (as was the fact) only one halfpenny in his possession:—

*Held*, that he could not be convicted of the offence of obtaining goods by false pretences, but that he was liable to be convicted of obtaining credit by means of fraud within the meaning of s. 13, sub-s. 1, of the Debtors Act, 1869. THE QUEEN *v.* WILLIAM JONES - - C. C. R. 119

2. —— *Intimidation — Seamen — Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *ss.* 7, 16.

Sect. 16 of the Conspiracy and Protection of Property Act, 1875, which enacts that the Act shall not apply to seamen, means seamen as defined by the Merchant Shipping Acts—that is to say, persons employed or engaged on board ship. The section, therefore, does not exempt from the punishments prescribed by the Act persons whose calling or occupation is the sea, but who are not actually so employed or engaged. THE QUEEN *v.* LYNCH AND JONES - C. C. R. 61

3. —— *Malicious Damage to Property—Assertion of Right—Using more Force than Necessary — Malicious Injuries to Property Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 51.

On the trial of an indictment for malicious damage to property under 24 & 25 Vict. c. 97, s. 51, where the defence set up is a claim of right, the proper direction to the jury is: Did the defendants do what they did in the exercise of a supposed right? adding that if, on the facts before them, the jury come to the conclusion that the defendants did more damage than they could reasonably suppose to be necessary for the assertion or protection of that right, then the jury may properly and ought to find the defendants guilty of malicious damage under s. 51. THE QUEEN *v.* CLEMENS - - - C. C. R. 556

4. —— *Malicious Injuries to Property Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 52—*Adding Water to Milk—Fraudulent Motive—Absence of Malice.*

A milk-carrier who damages his employer's milk by adding water to it, with no intention of injuring his employer, but in order to make a profit for himself by increasing the bulk of the milk, is guilty of an offence under s. 52 of the Malicious Injuries to Property Act, 1861.

*Hall* v. *Richardson*, (1889) 54 J. P. 345, disapproved. ROPER *v.* KNOTT - Div. Ct. 868

5. —— *Offences against the Person—Cruelty to Children—Proof of Age of Child—Prevention of Cruelty to Children Act*, 1894 (57 & 58 *Vict. c.* 41).

On the trial of an indictment for unlawfully and wilfully neglecting children under the age of sixteen, contrary to the Prevention of Cruelty to Children Act, 1894, the children were not produced before the Court, and the only evidence as to their ages was that of two persons who said that they had seen the children and stated what they believed were their respective ages, all of them being under sixteen, and that of the mistress of a school who said that the elder children attended a public elementary school, and she believed they were within the statutory age limit:—

*Held*, that there was evidence proper to be left to the jury that the children were under sixteen. THE QUEEN *v.* COX - C. C. R. 179

6. —— *Offences against the Person — Misdemeanor — Time of commencing Prosecution — Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *ss.* 5, 9.

By s. 5 of the Criminal Law Amendment Act, 1885, it is a misdemeanor to unlawfully carnally know a girl between the ages of thirteen and sixteen, and there is a proviso that no prosecution for that offence shall be commenced more than three months after the commission of the offence. By s. 9, on the trial of an indictment for rape, the defendant may, if the jury think the facts warrant it, be acquitted of the felony and convicted of the misdemeanor under s. 5. The defendant was committed for trial for rape, the offence having been committed less than three months before his committal for trial. On his trial, which took place more than three months

**CRIMINAL LAW**—*continued.*
after the commission of the offence, he was indicted only for the misdemeanor under s. 5, and convicted:—
*Held*, that the prosecution for the misdemeanor of which he was convicted was commenced less than three months from the commission of the offence so as to comply with the proviso to s. 5. THE QUEEN *v.* WEST - - C. C. R. 174

7. —— *Trespass on Grass Field — Actual Damage — Malicious Injuries to Property Act*, 1861 (24 & 25 *Vict. c.* 97), *s.* 52.
The appellant, a trespasser, walked across a grass field of the respondent. The grass was long, and the appellant did damage to the grass to the value of 6*d.*:—
*Held*, that he was liable to be summarily convicted under s. 52 of the Malicious Injuries to Property Act, 1861, which makes it an offence to "wilfully or maliciously commit any damage, injury or spoil to or upon any real or personal property whatsoever . . . . for which no punishment is hereinbefore provided." GRAYFORD *v.* CHOULER - - - - Div. Ct. 316

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**DEBTORS ACT** — False pretences — Obtaining credit by fraud - - - 119
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**DISTRICT REGISTRY**—Setting aside judgment in default of appearance—Jurisdiction of registrar - - - - 51
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**DIVIDED PARISHES**—Pauper—Loss of birth settlement - - - - 594
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**DOCK EXPENSES**—Apportionment—Ship surveyed while in dock for Lloyd's classification - - - - 722
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**DOCUMENTS**—Custody—Order for removal of parish documents—Justices—Jurisdiction - - - - - 164
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**DRAIN**—Nuisance—Several houses drained by single private drain—Joint notice to several owners to repair - - 855
*See* LOCAL GOVERNMENT. 5.

**DUTY**—Public Revenue.
*See* Cases under REVENUE.

**EDUCATION ACTS**—*Teacher's Remuneration—Superannuation Fund—Management of by School Board—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75), *s.* 35.

By s. 35 of the Elementary Education Act, 1870, a school board "may assign" to their officers and teachers "such salaries or remuneration (if any) as they think fit":—

*Held*, that it is within the powers of a school board under the above section to establish and manage a superannuation fund for the payment of allowances to their officers and teachers upon their superannuation, such fund being provided by contributions from the officers and teachers out of their salaries. PHILLIPS *v.* SCHOOL BOARD FOR LONDON. COCKERTON *v.* THE SAME
Div. Ct. 4

**ELECTION**—County council—Death of candidate between nomination and poll - 552
*See* LOCAL GOVERNMENT. 2.

—— School board—Petition—Interlocutory order—Appeal - - - - 353
*See* PRACTICE. 2.

**ELECTION PETITION**—*School Board—Recount of Votes—Correctness of Returning Officer's Figures—Onus of Proof.*

At an election for a school board there were eight candidates for five seats. The five highest on the poll, of whom the respondent was fifth, were declared by the returning officer to be elected. A petition was presented by the candidate who was sixth on the poll against the election of the respondent, on the ground that certain votes given for the petitioner had been wrongly counted for the respondent or for some other candidate, and the petitioner claimed the seat. A recount having been had of the votes given for the respondent and the petitioner, it appeared that the petitioner had a majority over the respondent. The votes of the other candidates were not recounted:—

*Held*, that the petitioner was entitled to the seat, for that it was enough for him to establish that he had more votes than the respondent, and that it was unnecessary for him to recount the votes given for the first four candidates. LORD MONKSWELL *v.* THOMPSON - Div. Ct. 479

—— Particulars—Scrutiny—Claim of seat 495
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**EMPLOYER AND WORKMAN**—Combination to induce a person not to employ another
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**EXECUTOR**—De son tort—Liability to pay probate duty - - - - 205
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—— Debt—Insolvent testator—Retainer in specie - - - - 282
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**EXEMPTION**—Rates—Royal College of Music—Scientific society - - - 809
*See* LOCAL GOVERNMENT. 7.

**EXTINGUISHMENT**—Of old franchise by statute—Prescriptive right - - 186
*See* TOLLS.

**FACTORY ACTS**—*Employment of Young Person during Prohibited Hours—Working for Amusement—Master and Servant—Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *ss.* 17, 83, 94.

A young person in the employment of the occupiers of a spinning mill during the time allowed for a meal oiled part of the machinery of the mill. He stated that he did so contrary to orders, and for his own amusement:—

*Held*, that he was working in what he did, and that, therefore, he was employed during prohibited hours contrary to the provisions of the Factory and Workshop Act, 1878, and that the occupiers of the mill were liable to a fine under s. 83 of that Act. PRIOR *v.* SLAITHWAITE SPINNING COMPANY - - - - Div. Ct. 881

2. —— "*Factory*"—"*Non-textile Factory*"—"*Bleaching and Dyeing Works*"—*Process of Hooking, Lapping, Making up, and Packing Cloth*—41 & 42 *Vict. c.* 16, *s.* 93, *Sched. IV., Part I*, *s.* 2.

Premises, in which the processes of hooking, lapping, making up, and packing cloth are carried on, are a "factory," within the meaning of the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), s. 93, and Sched. IV., Part I., s. 2, even if none of such processes are carried on as incidental to bleaching and dyeing. ROGERS *v.* MANCHESTER PACKING COMPANY - - - Div. Ct. 344

3. —— *Neglect to Fence Machinery—Compensation to Injured Person—Contributory Negligence—Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *s.* 82.

By s. 82 of the Factory and Workshop Act,

**FACTORY ACTS**—*continued.*

1878, "If any person is killed or suffers any bodily injury in consequence of the occupier of a factory having neglected to fence any machinery . . . . the occupier of the factory or workshop shall be liable to a fine not exceeding 100*l.*, the whole or any part of which may be applied for the benefit of the injured person or his family or otherwise as a Secretary of State determines":—

*Held*, that, where a person has been injured by the occupier's neglect to fence, the fact that the injury was proximately caused by such contributory negligence on the part of the injured person as would have debarred him from maintaining a civil action is no answer to a complaint under the above section. BLENKINSOP *v.* OGDEN **Div. Ct. 783**

4. —— *Underground Bakehouse — Premises vacant at Commencement of Act—Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 27, *sub-s.* 3.

By s. 27, sub-s. 3, of the Factory and Workshop Act, 1895, "A place underground shall not be used as a bakehouse unless it is so used at the commencement of this Act." Premises which had long been used as an underground bakehouse were vacant at the commencement of the Act, but their owner was seeking a tenant for them as a bakehouse:—

*Held*, that they were used as a bakehouse at the commencement of the Act. SCHWERZERHOF *v.* WILKINS - - - **Div. Ct. 640**

**FALSE IMPRISONMENT**—Returning from training—"Subject to military law" **393**
*See* VOLUNTEER.

**FALSE PRETENCES**—Obtaining credit by fraud—Debtors Act - - - **119**
*See* CRIMINAL LAW. 1.

**FENCE**—Neglect to fence machinery—Compensation to injured person—Contributory negligence - - - - **783**
*See* FACTORY ACTS. 3.

**FILE**—Filing copy of bill of sale and affidavit—Date of execution - - - **657**
*See* BILL OF SALE. 3.

**FINANCE ACT, 1894**—Estate duty **318, 355**
*See* REVENUE. 1, 2.

**FINE ARTS**—Royal College of Music—Rates—Exemption—Scientific societies - **809**
*See* LOCAL GOVERNMENT. 7.

**FISHERY**—*Salmon—Device to Catch Fish—Nets —"Other like Instrument"—Salmon Fishery Act*, 1861 (24 & 25 *Vict. c.* 109), *s.* 8—*Salmon Fishery Act*, 1873 (36 & 37 *Vict. c.* 71), *s.* 18.

A fishing net with an illegally small mesh is not a "like instrument" to a snare within the meaning of s. 8 of the Salmon Fishery Act, 1861, as extended by s. 18 of the Salmon Fishery Act, 1873; and, therefore, the mere possession of such a net, although with the intention of catching salmon by means thereof, is not an offence within those Acts. JONES *v.* DAVIES - **Div. Ct. 405**

**FOOTWAY**—Street—Main road—County borough—Frontagers - - - **847**
*See* LOCAL GOVERNMENT. 9.

**FOREIGN PRINCIPAL**—Income tax—Exercising trade in United Kingdom - **326**
*See* REVENUE. 4.

**FOREIGN SECURITY**—Issued in United Kingdom—Stamp duty - - - **78**
*See* REVENUE. 9.

**FOREIGNER**—Receiving order in lieu of committal—Jurisdiction - - **20**
*See* BANKRUPTCY. 8.

**FRAUD**—Obtaining credit by—False pretences—Debtors Act - - - **119**
*See* CRIMINAL LAW. 1.

**FRAUDULENT MOTIVE**—Malicious injuries to property—Adding water to milk—Absence of malice - - - **868**
*See* CRIMINAL LAW. 4.

**FREIGHT**—Bill of lading—Incorporation of conditions of charterparty - - **150**
*See* SHIP. 3.

**FRIENDLY SOCIETY** — *Alteration of Rules, Effect of.*

Sect. 27 of the Friendly Societies Act, 1855 (18 & 19 Vict. c. 63), enacted that friendly societies might alter, amend, or rescind their rules or make new rules.

A rule of a friendly society made at a time when that Act was in force provided that "No new rule shall be made, nor any of the rules herein contained or hereafter to be made shall be amended, altered, or rescinded, unless with the consent of a majority of the members present at a general meeting":—

*Held*, that that rule of itself conferred an independent power of altering the rules of the society, which power survived notwithstanding the repeal of the Act.

A person became a member of a friendly society at a time when the rules of the society contained a general provision that the rules might be altered. After he had become entitled under the rules to a benefit from the funds of the society in the nature of a superannuation allowance, and whilst he was in actual receipt of it, the rules of the society were so altered as to have the effect of depriving him of that benefit in case of a breach by him of the altered rules. To such alteration of the rules he did not assent except in so far as the fact of joining the society which had a general power of alteration constituted an assent:—

*Held*, that he was bound by the alteration. SMITH *v.* GALLOWAY - - - **Div. Ct. 71**

2. —— *Nomination by Member—Revocation by Subsequent Will—Friendly Societies Act*, 1875 (38 & 39 *Vict. c.* 60), *s.* 15, *sub-s.* 3.

A nomination made by a member of a friendly society under s. 15, sub-s. 3, of the Friendly Societies Act, 1875, and in compliance with the rules of the society, may be revoked by a subsequent will of the nominator not communicated to the society during the lifetime of the testator. BENNETT *v.* SLATER - - **Mathew J. 469**

**FRIVOLOUS AND VEXATIOUS ACTION**—Staying proceedings - - - **677**
*See* PRACTICE. 12.

**GAMING**—*Betting*—"*Place*" *used for Betting*—*Archway in Street*—*Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *ss.* 1, 3—*Criminal Law.*

The prisoner was in the habit of going to an archway which was a private thoroughfare leading from a public street into a yard containing dwelling-houses, stables, and workshops, for the purpose of betting with persons resorting to him there:—

*Held*, that the archway was a "place" within the meaning of the Betting Act, 1853, and that the prisoner was rightly convicted under that Act.

*Powell* v. *Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242, considered. THE QUEEN *v.* HUMPHREY - - - - - **C. C. R. 875**

**GLASS-HOUSES** — Rating — Market-garden — Agricultural land - - - **683**
*See* REVENUE. 6.

**GOODWILL**—Leasehold interest in licensed house—Conveyance on sale—Stamp - **226**
*See* REVENUE. 7.

**GRANT**—Prescriptive right—Extinguishment of old franchise by statute - - **186**
*See* TOLLS.

**GRASS FIELD**—Trespass on—Actual damage—Malicious injury to property - **316**
*See* CRIMINAL LAW. 7.

**HIGHWAY**—*Repairable ratione tenuræ*—*Person liable*—*Owner not in Occupation of Land*—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 25, *sub-s.* 2.

By s. 25, sub-s. 2, of the Local Government Act, 1894, "Where a highway repairable ratione tenuræ appears . . . . not to be in proper repair, and the person liable to repair the same fails when requested so to do . . . . to place it in proper repair, the district council may place the highway in proper repair, and recover from the person liable to repair the highway the necessary expenses of so doing":—

*Held*, that an owner of lands who was not the occupier of them was not "the person liable to repair the highway" within the meaning of the section. CUCKFIELD RURAL DISTRICT COUNCIL *v.* GORING - - - - **Div. Ct. 865**

—— Interference with road — Penalty for not substituting sufficient road - **473**
*See* RAILWAY. 1.

—— "Repairable by the inhabitants at large"—Frontagers—Paving - - **45**
*See* LOCAL GOVERNMENT. 10.

—— "Repairable by the inhabitants at large"—Sewering - - - - **294**
*See* LOCAL GOVERNMENT. 11.

—— Street — Footway — Main road — County borough—Frontagers - - **847**
*See* LOCAL GOVERNMENT. 9.

**IMPRISONMENT** — Returning from training—Assault and false imprisonment — Obedience to order of superior officer **888**
*See* VOLUNTEER.

**IMPROVEMENTS**—Compensation for—Agricultural Holdings Act—Notice of claim **8**
*See* LANDLORD AND TENANT. 1.

**INADVERTENCE** — Secured creditor—Omission to value security - - - **627**
*See* BANKRUPTCY. 11.

**INCOME TAX**—Deductions—Brewery business—Repairs to tied houses - - **95**
*See* REVENUE. 3.

—— Exercising trade in United Kingdom—Foreign principal - - - **326**
*See* REVENUE. 4.

**INCORPORATION**—Conditions of charterparty—Bill of lading—Freight - - **150**
*See* SHIP. 3.

**INDEMNITY**—Stock Exchange—Wrongful sale by broker - - - - **426**
*See* PRINCIPAL AND AGENT. 2.

**INJUNCTION** — Appeal — Action claiming less than 20*l.* damages - - - **417**
*See* COUNTY COURT. 1.

**INJURY**—Combination to induce a person not to employ another - - - **181**
*See* CONSPIRACY.

**INLAND REVENUE.**
*See* Cases under REVENUE.

**INN**—Leasehold interest in licensed house—Goodwill—Conveyance on sale—Stamp
*See* REVENUE. 7. **226**

—— Licensing Acts.
*See* Cases under LICENSING ACTS.

**INSOLVENT TESTATOR**—Debt due to executor—Retainer in specie - - **282**
*See* BANKRUPTCY. 10.

**INSPECTION**—Register of members—Company in voluntary liquidation - - **754**
*See* COMPANY. 1.

**INSURANCE, MARINE**—*Dock Expenses*—*Ship docked for Repair of Sea Damage*—*Ship surveyed while in Dock for Lloyd's Classification*—*Apportionment of Dock Charges and Expenses.*

During a voyage covered by a policy of marine insurance a vessel sustained damage by a peril insured against, and was subsequently put into dry dock for the purpose of effecting repairs. The survey of the vessel for the purpose of renewing her classification in Lloyd's Register was not due for some months, but the owners took advantage of her being in dry dock to have the survey made, and her classification was renewed:—

*Held* (by Chitty L.J. and Collins L.J., affirming the judgment of Mathew J., A. L. Smith L.J. dissenting), that there must be an apportionment between the owners and the underwriters of the expenses of getting the vessel into and out of the dock, as well as of dock dues incurred in respect of the common user of the dock for the repairs and the survey.

*Marine Insurance Co.* v. *China Transpacific Steamship Co.*, (1886) 11 App. Cas. 573, followed. RUABON STEAMSHIP COMPANY *v.* LONDON ASSURANCE - - - - - **C. A. 722**

**INSURANCE, MARINE**—*continued.*

2. —— *Policy — Attachment of Risk —Ships "sailing" on or after a specified Date.*

In an action on a policy of marine insurance on goods in ships "sailing on or after March 1," it appeared that the ship in question, having cleared the Custom House, finished loading her cargo about ten o'clock at night on February 29, and was then ready to go to sea, but by a regulation of the port ships were not allowed to leave the port after dark. The master, however, with the object of keeping his crew on board so as to be ready to start early in the morning, moved away from the wharf about five hundred yards out into the river and there anchored. In so moving the ship he placed her in a slightly more advantageous position for starting than she would have been in had she remained at the wharf, but the gaining of such advantage was no part of the master's motive in moving her. On the following morning, March 1, she proceeded on her voyage :—

*Held*, that the ship "sailed" on March 1, and not on February 29, and that the policy attached. SEA INSURANCE COMPANY *v.* BLOGG **Mathew J. 27**

3. —— *Policy—Insurance on Ship—Perils of the Seas—Consequential Damage, Underwriter's Liability for—Cost of Disposing of Cargo rendered Worthless by Sea Peril.*

A ship, insured under a time policy on hull and materials, machinery and boilers, against perils of the seas and all other perils, losses, and misfortunes which might come to her hurt, detriment, or damage, was, during the currency of the policy, injured through a collision in the Thames whilst making for London, her port of destination, a hole being knocked in her bottom. Her cargo, cotton seed, through the action of the water and mud which came through the hole, became rotten, offensive, and worthless, and neither the cargo owners nor their underwriters would pay freight or take delivery. After the collision part of the cargo was put into lighters in order to allow the ship to be taken into dry dock, where she was temporarily patched. Subsequently she was towed to the Millwall Dock to discharge the rest of the cargo, and thereupon the sanitary authority of the district ordered her to abate the nuisance caused by the offensive condition of the cotton seed and to remove it. The ship accordingly was taken down the river to Dagenham Pier, and her cargo was there discharged by contractors on to land belonging to them. In an action on the policy by the shipowners to recover from their underwriter the cost of dealing with the cargo between the date of the collision and the date of its arrival at Dagenham, and also the contractors' charges for discharging and disposing of it there :—

*Held*, that the plaintiffs were not entitled to recover any of such cost or charges. FIELD STEAMSHIP COMPANY *v.* BURR **Bigham J. 821**

4. —— *Policy—Re-insurance—Collision Clause —Collision with sunken Barge.*

The plaintiff underwrote a time policy on a steamer, containing a clause that if the steamer should come into collision with any other vessel, and the insured should have to pay damages, the insurers would pay.

**INSURANCE, MARINE**—*continued.*

The defendant underwrote a policy of re-insurance, on the same steamer, for the same period, subject to the same clauses and conditions as the original policy, and to pay as might be paid thereon, but only to pay all claims for loss or damage done or received through collision.

During the period covered the steamer struck a barge, which had just been sunk by collision with another vessel, and the steamer was damaged. The barge was raised next day, and sailed to her home port, and was repaired :—

*Held*, that, although, at the moment when the steamer struck her, the barge could not have been navigated, yet, as she became navigable as soon as she was raised, there was a collision between two navigable vessels, in respect of which the plaintiff was entitled to recover on the policy of reinsurance. CHANDLER *v.* BLOGG **Bigham J. 32**

5. —— *Policy — Re-insurance — "Covering Note"—"Open Cover"—Risks to be afterwards declared—"Contract for Sea Insurance"—Contract not expressed in a Policy—Invalidity—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 93, 95.

A "covering note," or "open cover," by which underwriters undertake to re-insure marine risks to be afterwards declared, is not a policy of sea insurance, within the meaning of the Stamp Act, 1891, and therefore cannot be stamped after execution, and produced in evidence, on payment of a penalty, under s. 95, sub-s. 2, of that Act, but it is a contract for sea insurance, which, not being expressed in a policy, is invalid under s. 93, sub-s. 1, and therefore no action can be maintained on it, either as a contract for sea insurance, or as a contract to issue a policy. HOME MARINE INSURANCE COMPANY *v.* SMITH **Mathew J. 329**

6. —— *Re-insurance—Construction of Policy —Re-insurer's Liability on Subsequent Policies.*

A time policy of insurance on a ship was expressed to be "a re-insurance of policy or policies and subject to the same terms, conditions, and clauses as original policy or policies and to pay as may be paid thereon." The assured had underwritten two time policies on the ship, and these were in force when the re-insurance was effected. Subsequently, during the currency of the re-insurance policy, the two original policies came to an end, and he underwrote a fresh time policy of insurance of the same subject-matter differing in certain respects from the two earlier original policies ;—

*Held*, that the re-insurers' liability was not limited to losses covered by the policies existing when the re-insurance was effected, but that the policy of re-insurance covered a loss, occurring during its currency, which the assured paid under the policy underwritten by him after he effected the re-insurance. LOWER RHINE AND WÜRTEMBERG INSURANCE ASSOCIATION *v.* SEDGWICK **Kennedy J. 739**

**INTERLOCUTORY ORDER** — Appeal — School board election—Petition - - **353**
*See* PRACTICE. 2.

**INTIMIDATION**—Seamen—Conspiracy and Protection of Property Act - - **61**
*See* CRIMINAL LAW. 2.

**JOINDER** — Counter-claim — Cause of action against plaintiff by defendant jointly with another person - - 798
*See* PRACTICE. 5.

—— Of causes of action—Separate causes of action against all and against some of defendants - - - - 348
*See* PRACTICE. 9.

—— Of claim for possession and claim for rent—Practice - - - - 276
*See* LANDLORD AND TENANT. 3.

—— Trustee in bankruptcy—Security for costs—Jurisdiction - - - 660
*See* COUNTY COURT. 4.

**JUDGMENT**—Setting aside in default of appearance—Jurisdiction of registrar - 51
*See* PRACTICE. 8.

**JUDGMENT DEBT**—Equitable assignment of—Bankruptcy notice - - - 419
*See* BANKRUPTCY. 2.

**JUDGMENT DEBTOR**—Receiving order in lieu of committal—Foreigner - - 20
*See* BANKRUPTCY. 8.

**JUDGMENTS EXTENSION ACT, 1868**—Bankruptcy notice—Scottish judgment registered in England - - - 383
*See* BANKRUPTCY. 3.

**JURISDICTION**—Bastardy applications - 734
*See* BASTARDY.

—— Costs—Charging order—Property recovered or preserved - - - 520
*See* SOLICITOR. 1.

—— County court — Company — Winding-up—Committal for contempt - - 669
*See* PROHIBITION.

—— Defendant out of—Substituted service 12
*See* PRACTICE. 10.

—— District registrar—Setting aside judgment in default of appearance - - 51
*See* PRACTICE. 8.

—— Excess of — Licence — Certiorari — Mandamus - - - - - 663
*See* LICENSING ACTS. 1.

—— Goods seized to realize security — Relief against seizure - - - 543
*See* BILL OF SALE. 2.

—— Justices—Order for removal of parish documents - - - - 164
*See* LOCAL GOVERNMENT. 6.

—— Justices—Power to require witnesses to be sworn - - - - 578
*See* LICENSING ACTS. 3.

—— Justices—Right to be tried by jury - 582
*See* JUSTICES. 2.

—— Receiving order in lieu of committal—Foreigner - - - - 20
*See* BANKRUPTCY. 8.

—— Security for costs—Bankruptcy of plaintiff—Joinder of trustee - - 660
*See* COUNTY COURT. 4.

—— Striking off the rolls—Misconduct—Order of Colonial Court - - - 331
*See* SOLICITOR. 2.

—— Summary—Buildings—Service of notices
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**JURISDICTION**—*continued.*

—— Winding-up of company—Refusal by director or officer to submit statement of affairs - - - - 573
*See* COMPANY. 2.

**JURY**—Right to be tried by—Justices—Summary jurisdiction - - - 582
*See* JUSTICES. 2.

**JUSTICES**—*Disqualification—Incompatible Offices—Clerk to Justices.*

The position of clerk to justices is incompatible with that of justice of the peace; and therefore where a person who held the office of clerk to justices was elected to another office which carried with it the position of justice of the peace, his acceptance of the latter office vacated that of clerk to the justices. THE QUEEN *v.* DOUGLAS - - - - Div. Ct. 560

2. —— *Jurisdiction—Right to be tried by Jury—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 17, *sub-s.* 2.

Where a person appears before a court of summary jurisdiction, charged with an offence to which s. 17 of the Summary Jurisdiction Act, 1879, applies, the Court ought, in pursuance of sub-s. 2, to inform him of his right to be tried by a jury before he pleads to the charge. If he be not informed of that right and, after the charge has been gone into, pleads guilty, the conviction is bad.

*Semble:* It is immaterial whether or not he knew of his right to be tried by a jury, and immaterial whether or not the Court knew, before the proceedings commenced, that he meant to plead guilty in the course of the case. THE QUEEN *v.* COCKSHOTT - - Div. Ct. 582

**LANDLORD AND TENANT**—*Compensation for Improvements—Notice of Claim—Determination of Tenancy—Agricultural Holdings Act*, 1883 (46 & 47 *Vict. c.* 61), *s.* 7.

A tenant of a farm on a yearly tenancy was by the terms of his lease to hold the land from February 2 and the buildings from May 1. In June, 1896, he gave notice to the landlord of his intention to deliver up the land on February 2, 1897, on which latter date he duly delivered up possession of the land. On February 26, 1897, he gave notice to the landlord under the Agricultural Holdings Act, 1883, claiming compensation for unexhausted improvements; and on May 1, 1897, he gave up possession of the buildings.

By s. 7 of the said Act notice of claim for compensation must be given two months at least before the determination of the tenancy:—

*Held*, that the tenancy determined within the meaning of the Act on February 2 and not on

**LANDLORD AND TENANT**—*continued.*
May 1, and that the notice of claim was consequently too late. MORLEY *v.* CARTER
Div. Ct. 8

2. —— *Covenant, Construction of*—"*Assigns*"—*Underlessee*—*Lease of Public-house*—*Licence*—*Breach of Covenant.*

The lessee of a public-house covenanted with his lessor, the plaintiff, that he, his executors, administrators, or assigns would not wilfully do or suffer any act or thing which might be a breach of the rules and regulations established by law for the conducting of licensed public-houses, or be a reasonable ground for the withdrawing or withholding of all or any of the licences for the sale of beer and ale, wine, and spirituous liquors therein. The lessee assigned the term to the defendants, who underlet the premises. The underlessee committed an offence against the licensing laws, the result of which was that the renewal of the licences was refused. In an action for breach of the covenant:—

*Held*, that the term "assigns" in the covenant did not include an underlessee, and that the defendants were not liable for a breach of the covenant in respect of the offence committed by their underlessee. BRYANT *v.* HANCOCK & Co.
C. A. 716

3. —— *Covenant to Repair*—*Notice of Breach*—*Continuing Breach*—*Breach after expiration of Notice*—*Right to Re-enter*—*Rent due before Action*—*Joinder of Claim for Possession and Claim for Rent*—*Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-s.* 1.

A lease contained a general covenant to repair and a covenant to repair within three months after notice. The premises being out of repair, the lessor gave notice to the lessee under the Conveyancing Act, 1881, to repair within a given time. Three days after the expiration of the notice a quarter's rent became due. No repairs having been done by the tenant, the lessor brought an action to recover possession, and in the action claimed the quarter's rent:—

*Held*, that, the breach of covenant being a continuing one, no new notice was required in respect of the non-repair after the expiration of the time specified in the notice, and that the claim for rent did not affect the right to possession in respect of non-repair after the date when the rent fell due. PENTON *v.* BARNETT
C. A. 276

**LEASE.**
*See* Cases under LANDLORD AND TENANT.

**LEASEHOLD**—Licensed house—Goodwill—Conveyance on sale—Stamp - - 226
*See* REVENUE. 7.

**LIABILITY**—Costs—County council—Separate court of quarter sessions - - 141
*See* LOCAL GOVERNMENT. 1.

—— To pay probate duty—Executor de son tort
*See* REVENUE. 5. 205

**LIBEL**—Costs—Mayor's Court—Less than 5*l.* recovered - - - - 513
*See* LONDON. 3.

**LICENSING ACTS**—*Licence*—*Excess of Jurisdiction*—*Certiorari*—*Mandamus.*

At a general annual licensing meeting an application was made for a licence to sell intoxicating liquors. The justices granted the licence upon the applicant paying to them a sum of money, which money they intended to apply in reduction of the rates of the borough, or for some other similar purpose. Certain persons, who had appeared before the justices in opposition to the application, then obtained a rule for a certiorari to bring up the licence to be quashed, and also a rule for a mandamus to hear and determine the application for a licence according to law:—

*Held*, that the rule for a mandamus must be made absolute, on the ground that the objectors had a right to be heard before the licensing justices according to law, that the justices in annexing to the grant of the licence the condition of the payment of money shewed that they had allowed their decision to be influenced by extraneous considerations, and that the hearing under such circumstances was equivalent to no hearing at all; but that the rule for a certiorari must, on the authority of *Reg.* v. *Sharman*, [1898] 1 Q. B. 578, be discharged on the ground that the grant by licensing justices of a licence to sell intoxicating liquor is not a judicial order. REG. *v.* BOWMAN - - - - Div. Ct. 663

2. —— *Licence*—"*Off-Licence*"—*Order sanctioning Removal*—*Application for New Licence*—*Notice of Application*—*Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 50.

Where the holder of an "off-licence" for the sale of beer, wine, and spirits in respect of certain premises, who had at the general annual licensing meeting obtained a renewal of that licence, proceeded also to apply for a new licence of a similar description in respect of other premises, and the licensing justices granted the application on condition that he gave up the licence for the first-mentioned premises, and ceased forthwith to carry on the sale of beer, wine, and spirits there, which he agreed to do:—

*Held*, that the application, being in substance one for an order sanctioning removal of a licence, came within s. 50 of the Licensing Act, 1872, and, therefore, the justices had no jurisdiction to grant it unless the requirements of that section were satisfied. REG. *v.* THORNTON. *Ex parte* LACON & Co. - - - - C. A. 334

3. —— *Licence*—*Practice*—*Application for New Licence*—*Jurisdiction of Justices*—*Power to require Witnesses to be Sworn*—*Certiorari*—*Mandamus.*

On the hearing, at a general annual licensing meeting, of an application for a new licence for a hotel, witnesses were called on behalf of persons who opposed the granting of the licence, and these witnesses gave evidence on oath. Another person then appeared to oppose, and proposed to make statements of fact. The justices required that he should be sworn. He refused, and they declined to hear him, and granted the licence.

On an application for a certiorari, or for a mandamus to the justices to hear and determine:—

*Held*, that the certiorari ought not be granted, and *semble*, that, as the justices at the licensing

**LICENSING ACTS**—*continued.*
meeting were not acting as a court of summary jurisdiction, but in an administrative capacity, certiorari would not lie:

*Held*, also, that the justices were acting within their jurisdiction in refusing to hear statements not made upon oath, and a mandamus must be refused. THE QUEEN *v.* SHARMAN. *Ex parte* DENTON - - - - **Div. Ct. 578**

4. —— *Licence—Transfer—Premises pulled down—Person to apply—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *ss.* 4, 14—*Practice—Mandamus—Costs.*

Where a licensed house is pulled down for the purpose of public improvements, and application is made under s. 14 of the Alehouse Act, 1828, for the grant to the person whose house has been pulled down of a licence in respect of other fit and convenient premises, the application must be made by a licensed person who was keeping the old premises as an inn at the time of their demolition.

Where a person, who has successfully opposed the granting of a licence, subsequently successfully shews cause against the making absolute of a rule nisi for a mandamus to the licensing justices or to quarter sessions, the Court has a discretion to grant him the costs of shewing cause against the rule, although licensing justices are not a court of summary jurisdiction.

*Boulter* v. *Kent Justices*, [1897] A. C. 556, considered. THE QUEEN *v.* JUSTICES FOR WEST RIDING OF YORKSHIRE. *Ex parte* SHAW **Div. Ct. 503**

5. —— *Offences—Keeping open Premises during Prohibited Hours—Theatres—Licensing Acts*, 1872 (35 & 36 *Vict. c.* 94), *s.* 72; 1874 (37 & 38 *Vict. c.* 49), *ss.* 3, 9.

The Licensing Act, 1874 (which is to be read as one with the Licensing Act, 1872), provides (ss. 3, 9) that all premises in which intoxicating liquors are sold by retail shall be closed at certain specified times; and penalties are imposed on persons keeping open such premises during the prohibited times. Sect. 72 of the Licensing Act, 1872, provides that "nothing in this Act shall affect or apply to the sale of intoxicating liquors by proprietors of theatres, in pursuance of the Acts in that behalf":—

*Held*, that s. 72 of the Act of 1872 did not apply to exempt the proprietor of a theatre, who held an excise licence to sell intoxicating liquors by retail at his theatre, from the provisions, with respect to closing, contained in the Act of 1874. GALLAGHER *v.* RUDD - - **Div. Ct. 114**

—— Appeal against refusal of licence—Costs of chief constable—Borough fund - **604**
*See* MUNICIPAL CORPORATION.

—— Justices—Hearing and determination according to law - - - **802**
*See* MANDAMUS.

—— Licence—Lease of public-house—Breach of covenant - - - - **716**
*See* LANDLORD AND TENANT. 2.

**LLOYD'S CLASSIFICATION** — Ship surveyed while in dock for—Apportionment of dock expenses - - - **722**
*See* INSURANCE, MARINE. 1.

**LOCAL GOVERNMENT** — *County Council — Borough having Population under* 10,000—*Separate Court of Quarter Sessions—Liability for Costs—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 169—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 38.

In the case of boroughs having a separate court of quarter sessions and containing a population of less than 10,000 the Local Government Act, 1888, has not transferred the obligation of paying the salaries of the recorders and clerks of the peace of such courts of quarter sessions from the borough to the county council.

*Ex parte County Council of Kent and Council of Sandwich*, [1891] 1 Q. B. 389, not followed. THETFORD CORPORATION *v.* NORFOLK COUNTY COUNCIL - - - - **Wills J. 141**

2. —— *County Council—Election of—Practice—Death of Candidate between Nomination and Poll—Duty of Returning Officer to countermand Poll—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 58—*Ballot Act*, 1872 (35 & 36 *Vict. c.* 33), *s.* 1.

Where, at a contested election for a county council, a candidate dies between the nomination and the poll, it is the duty of the returning officer for the division in which he was a candidate to countermand notice of the poll. THE QUEEN *v.* STEWART - - - - **Div. Ct. 552**

3. —— *Cowsheds—Contagious Diseases (Animals) Act*, 1878 (41 & 42 *Vict. c.* 74), *s.* 34—*Dairies, Cowsheds, and Milkshops Order*, 1885, *s.* 13—*Power of Local Authority to regulate Air-space.*

The power given by the Contagious Diseases (Animals) Act, 1878, and the Dairies, Cowsheds, and Milkshops Order, 1885, to local authorities to make regulations for prescribing and regulating the ventilation of dairies and cowsheds, permits a local authority to make regulations respecting air-space in such places. BAKER *v.* WILLIAMS - - - - **Div. Ct. 23**

4. —— *Nuisance—Abatement Notice—Smoke—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 94.

The occupier of a factory, the chimney of which caused a nuisance by sending forth black smoke, was served by the local authority with a notice under s. 94 of the Public Health Act, 1875, requiring him within a specified time to abate the same, and for that purpose to abstain at all times from doing or suffering to be done anything which would cause a recurrence of the nuisance:—

*Held*, that the notice was good, and that it was unnecessary that it should go on to require the execution of any works or the doing of anything as a means to the abatement. MILLARD *v.* WASTALL - - - - **Div. Ct. 342**

5. —— *Nuisance — Public Health — Several Houses Drained by Single Private Drain—Joint Notice to Several Owners to Repair—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 41—*Public Health Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 19.

Five houses, of which three belonged to one owner and two to another, were connected with the public sewer by a single private drain. The drain being a nuisance and injurious to health,

**LOCAL GOVERNMENT**—*continued.*

the local authority served on each of the two owners a notice, under s. 41 of the Public Health Act, 1875, and s. 19 of the Public Health Act, 1890, addressed to them jointly, requiring them to relay the whole of the drain:—

*Held*, that the fact that neither of the owners could relay the part of the drain situate in the other's premises without committing a trespass was no objection to the validity of the notice, and that on non-compliance with the notice the local authority might execute the work and recover the expenses from the owners under the last-mentioned section. LANCASTER *v.* BARNES DISTRICT COUNCIL - - - **Div. Ct. 855**

6. —— *Parish Council—Custody of Parish Documents—Tithe Apportionment—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 17, *sub-s.* 8—*Justices—Jurisdiction—Order for Removal of Parish Documents—Tithe Act*, 1860 (23 & 24 *Vict. c.* 93), *s.* 28.

A parish council has power, under s. 17, sub-s. 8, of the Local Government Act, 1894, to direct that the copy of the tithe apportionment of the parish in the custody of the incumbent of the parish under 6 & 7 Will. 4, c. 71, s. 64, shall be removed from his custody and deposited with the council.

Where the parish council has given such a direction, and the county council has affirmed it, a court of summary jurisdiction has jurisdiction, under s. 28 of 23 & 24 Vict. c. 93, to make an order enforcing the removal. LEWIS *v.* POOLE **Div. Ct. 164**

7. —— *Rates—Exemption—Society instituted for Purposes of the Fine Arts—Royal College of Music—Society not making "any Dividend, Gift, Division, or Bonus in Money unto or between any of its Members"—Scientific Societies Act*, 1843 (6 & 7 *Vict. c.* 36), *s.* 1.

The Royal College of Music was a society created and incorporated by a royal charter, for the advancement of the art of music by means of a teaching and examining body, charged with the duty of providing musical instruction of the highest class, and of rewarding with academical degrees and certificates of proficiency, and otherwise, persons, whether educated or not at the college, who on examination might prove themselves worthy of such distinctions, for the promotion and supervision of musical instruction in schools and elsewhere conducive to the cultivation and dissemination of the art of music, and for the encouragement and promotion of the cultivation of music as an art. The college erected a building on land demised to them by a lease containing a stipulation that the building should be used for the purposes of their charter only, and it was so occupied and used by them. The charter prohibited any "dividend, gift, division, or bonus in money" to the members. The college paid out of its funds remuneration to certain members of its teaching staff who were also members of the society:—

*Held* (affirming the judgment of Hawkins and Channell JJ., [1898] 1 Q. B. 304), that the college was a society instituted for purposes of the fine arts exclusively within the meaning of the

**LOCAL GOVERNMENT**—*continued.*

Scientific Societies Act, 1843, s. 1, and did not, in making the above-mentioned payments to members of the teaching staff "make any dividend, gift, division, or bonus in money" to its members within the meaning of the section; and therefore that the society was entitled to exemption from parochial rates in respect of the building occupied by them as aforesaid. ROYAL COLLEGE OF MUSIC *v.* WESTMINSTER VESTRY - - **C. A. 809**

8. —— *Rates—Rural District Council—Special Expenses—Retrospective Rate—Delay in Commencement of Action—Mandamus to enforce Judgment—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 210, 229, 230.

The defendants, a rural district council, in 1895 incurred a debt to an urban district council in respect of water supply for a contributory place within their district. The defendants refused to pay the debt, setting up a cross-claim against the urban district council for damages for breach of agreement to a greater amount. In respect of these conflicting claims a prolonged correspondence and negotiation took place between the two councils; but, ultimately, the urban district council brought an action for their debt in March, 1897, and on May 15, 1897, the amount actually payable to them was ascertained by judgment being recovered by them for a balance of their debt above the sum recovered by the defendants on their counter-claim. On October 25 in the same year the urban district council applied for a mandamus commanding the defendants to issue their precept to the overseers of the contributory place for payment of the amount recovered:—

*Held*, that, the delay in the commencement of the action being under the circumstances excusable, the mandamus ought to issue and that the rate which would thereupon have to be made would not be illegal as being retrospective.

*Waddington* v. *City of London Union*, (1858) E. B. & E. 370, and *Worthington* v. *Hulton*, (1865) L. R. 1 Q. B. 63, discussed. THE QUEEN *v.* LEIGH RURAL DISTRICT COUNCIL - **C. A. 836**

9. —— *Street—Footway—Main Road—County Borough—Frontagers—Local Act—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 11.

A local Act passed in 1871 gave power to the corporation of a municipal borough to order that in any street (whether or not a highway repairable by the inhabitants at large) footways should be made by the frontagers of such form, size, and materials as the corporation should direct, and provided that if the frontagers made default in the execution of the work the corporation might cause the work to be executed and recover the expense incurred in respect thereof from the frontagers:—

*Held*, that where the municipal borough had by virtue of the Local Government Act, 1888, become a county borough, the provisions of s. 11 of that Act had not the effect of repealing the provisions of the local Act as regards streets which were main roads within the meaning of the Highways and Locomotives (Amendment) Act, 1878. LODGE *v.* HUDDERSFIELD CORPORATION - - - - - **Div. Ct. 847**

**LOCAL GOVERNMENT**—*continued.*

10. —— *Street—Paving—Highway repairable by Inhabitants at large—Frontagers—Local Act—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 149, 340.

Where a local Act, passed in 1849, gave power to a municipal corporation to order that any street, whether a public highway or not, should be sufficiently sewered, drained, levelled, flagged, paved, and otherwise completed by the frontagers, and provided that, if they made default in the execution of the work, the corporation might cause the work to be executed and recover the expense incurred in respect thereof from the frontagers:—

*Held*, that the Public Health Act, 1875, s. 149, had not the effect of repealing the provision of the local Act as regards streets which were highways repairable by the inhabitants at large. ASHTON-UNDER-LYNE CORPORATION *v.* PUGH - - - - - **C. A. 45**

11. —— "*Street*"—*Sewering—Local Authority—Powers*—"*Highway repairable by the Inhabitants at large*"—*Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 5, 6.

The definition of "street" in the Private Street Works Act, 1892, s. 5, excludes "a highway repairable by the inhabitants at large."

By s. 6 an urban authority is empowered, with respect to streets, to do certain sewering works.

An urban authority proposed to do sewering works in a certain place in their borough. The place in question (which was called a street) was formed before 1816, and had always been open at both ends into highways, and the place and buildings had existed in the same condition for seventy years, and since its formation the way had been used by foot-passengers without interruption. Neither public nor private repairs were proved.

On a case stated on the hearing and determination by justices of objections to the proposed works:—

*Held*, that the place in question was not a "street," within the meaning of the Act, being a footway repairable by the inhabitants at large, and therefore the urban authority had no power to execute the proposed works. RISHTON *v.* HASLINGDEN CORPORATION - - **Div. Ct. 294**

12. —— *Water-closets — Local Authority — Powers—Power to require sufficient Water-closet to be provided—Resolution requiring Adoption of Particular System — Notice in accordance with General Resolution — Invalidity — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 36.

Sect. 36 of the Public Health Act, 1875, which empowers a local authority to give notice requiring the owner of a house to provide a sufficient water-closet, earth-closet, or privy, and in case of non-compliance empowers the local authority to do the necessary works and recover the expenses, does not empower such authority to enforce a general resolution that in all such cases within their jurisdiction a particular system shall be adopted; but they are bound to exercise their discretion in each particular case, and consequently a notice in accordance with the general resolution and requiring compliance with its provisions is invalid. WOOD *v.* WIDNES CORPORATION **C. A. 463**

—— Highway — Repairable ratione tenuræ — Person liable—Owner not in occupation of land - - - - **865**
*See* HIGHWAY.

—— Pauper—Loss of birth settlement - **594**
*See* POOR LAW.

—— Valuation — Trade interest — Tied public-house—"Betterment" - - **387**
*See* LONDON. 6.

**LOCK-OUT** — Charterparty — Exceptions — Accident to railway - - - **261**
*See* SHIP. 4.

**LONDON**—*Building—Service of Notices—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 188 (*Local and Private*)—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 1.

By s. 188 of the London Building Act, 1894, any notice, order, or other document required to be served under that Act, the service of which is not provided for by the Summary Jurisdiction Acts, may be served, if no person be found on the premises to which it relates, by fixing a copy on some conspicuous part of the building to which it relates. By s. 1 of the Summary Jurisdiction Act, 1848, a summons issued upon any information or complaint shall be served by delivering it to the person to whom it is directed, or by leaving it with some person for him at his last or most usual place of abode. A summons issued upon a complaint made under the London Building Act, 1894, and addressed "To the owner" of a building alleged to be in a dangerous condition, was served by fixing a copy of the summons on a conspicuous part of the building. The premises were said to be unoccupied. The owner did not appear on the summons:—

*Held* that, in the absence of evidence that reasonable inquiry had been made to find out who was the owner so that he could be served under s. 1 of the Summary Jurisdiction Act, 1848, the provisions of s. 188 of the London Building Act, 1894, were not applicable, and therefore that the service was bad. THE QUEEN *v.* MEAD - - - - **Div. Ct. 110**

2. —— *Buildings—Notice to Set Back—Forecourt or Space—Boundary Wall—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 14 (*Local and Private*).

Sect. 14 of the London Building Act, 1894, does not empower the London County Council to give notice requiring the owner or occupier of land, upon part of which he has erected a new building, to set back an old boundary wall, forming the boundary of a space left between the new building and a street, so that the wall shall not be at less than the prescribed distance from the centre of the roadway of the street. LONDON COUNTY COUNCIL *v.* AYLESBURY DAIRY COMPANY **Div. Ct. 106**

3. —— *Mayor's Court — Practice — Costs — Libel—Less than 5l. recovered—Mayor's Court of London Act*, 1857 (20 & 21 *Vict. c. clvii.*), *s.* 11—*Rules of* 1890 *and* 1892.

The fact that in a particular case no scale of

LONDON—*continued.*
costs is provided by the Mayor's Court of London Rules, 1890, is not in itself sufficient to shew that that Court has no inherent jurisdiction to order costs in the cases not specifically provided for.

*Semble*, that in actions for libel tried in the Mayor's Court of London, in which less than 5*l.* is recovered, the Court has jurisdiction to order costs to be paid to the plaintiff, beyond court fees and allowances to witnesses, although no scale is provided by the rules for such a case. HALL *v.* LAUNSPACH - - - - C. A. 513

4. —— *Nuisance—Abatement Notice—Service of on Person not Liable—Work done in Obedience to Notice—Recovery of Expense from Person Liable—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 4, *sub-ss.* 1, 4; *s.* 11, *sub-s.* 1.

By s. 4, sub-s. 1, of the Public Health (London) Act, 1891, the sanitary authority may in certain cases serve upon the owner or occupier of premises upon which a nuisance exists a notice requiring him to abate the same; and by sub-s. 4, if the person served with such a notice "makes default in complying" with it, he is to be liable to a penalty whether any nuisance order is made upon him or not. By s. 11, sub-s. 1, "All reasonable costs and expenses incurred in serving a notice, making a complaint, or obtaining a nuisance order, or in carrying the order into effect, shall be deemed to be money paid for the use and at the request of the person on whom the order is made; . . . . or if no order is made . . . . then of the person by whose act default or sufferance the nuisance was caused."

The drainage of two adjoining houses situate in the metropolis being so defective as to be a nuisance, the sanitary authority served a notice under s. 4, sub-s. 1, of the Public Health (London) Act, 1891, upon the owner of the houses requiring him to abate the nuisance. The drainage of the houses was carried away by means of a single pipe, and the owner, being under the belief that this combined system of drainage had been authorized by an order of the sanitary authority, and that the liability to repair the pipe consequently lay upon him under the provisions of the Metropolis Local Management Act, 1855, executed the works prescribed by the notice. In fact, the combined plan of drainage had not been authorized by any such order, and the liability to repair the pipe was by that Act imposed upon the sanitary authority. On discovery of the mistake he sought to recover from the sanitary authority the expense he had incurred:—

*Held*, (1.) that as non-compliance with the notice would have rendered him primâ facie liable to a penalty under s. 4, sub-s. 4, of the Act of 1891, he was practically compelled to do the work, and that he could consequently recover the expense as money paid at the sanitary authority's request; (2.) that the "expenses of carrying the order into effect" mentioned in s. 11 include the expenses of doing work in obedience to an abatement notice, and that consequently the owner, whether he was compelled to do the work or not, could under that section recover the expense from the sanitary authority as the persons by whose default the nuisance was caused.

LONDON—*continued.*
*Gebhardt* v. *Saunders*, [1892] 2 Q. B. 452, followed. ANDREW *v.* ST. OLAVE'S BOARD OF WORKS - - - - - Div. Ct. 775

5. —— *Street—New Street—"Direct Communication"—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 9, *sub-s.* 4.

Sect. 9 of the London Building Act, 1894, gives power to the county council to refuse their sanction to the formation of a new street where such street would not afford "direct communication" between two existing streets:—

*Held*, that the question whether a proposed new street did or did not afford such direct communication was a question of fact, with the decision of which the Court would not interfere. WOODHAM *v.* LONDON COUNTY COUNCIL Div. Ct. 863

6. —— *Valuation—London County Council—"Betterment"—Initial Valuation—Trade Interest—Tied Public-house—Local Government—London County Council (Tower Bridge Southern Approach) Act*, 1895 (58 & 59 *Vict. c. cxxx.*).

By the London County Council (Tower Bridge Southern Approach) Act, 1895, provision was made for a charge to be made on lands which would be increased in value by the proposed improvement, and for an initial valuation of such lands. By s. 36, "In making such valuation the valuer shall separately distinguish and assess in each case the value of the land apart from that of any existing buildings thereon, and shall also value the land and buildings as a whole, and shall not take into consideration any increased value accruing or supposed to accrue to such land or buildings from or in consequence of the improvement, but shall only take into consideration the value independently of the improvement, and as if the improvement had not been contemplated. The valuer shall also separately value the interest of the owner of any such lands, and the interest of every lessee of any such lands, for a term having not less than twenty-one years unexpired at the date of the valuation (excluding from each such valuation any trade interest)."

In making an initial valuation of a "tied" public-house:—

*Held*, (1.) That, in valuing the land apart from the buildings thereon, the valuer might not take into consideration either the takings and payments of the public-house, nor the fact that it was "tied."

(2.) That, in valuing the land and buildings as a whole, evidence of the takings and payments should not be admitted even for the purpose of testing the evidence of witnesses, and that on this head the fact that the house was "tied" was immaterial.

(3.) That, in valuing the interests of the owner and lessees, the "tying" covenant must be taken into consideration. *In re* LONDON COUNTY COUNCIL AND CITY OF LONDON BREWERY COMPANY Div. Ct. 387

LONDON COUNTY COUNCIL (TOWER BRIDGE SOUTHERN APPROACH) ACT, 1895—Valuation—Tied public-house - 387
*See* LONDON. 6.

**MALICE**—Adding water to milk—Fraudulent motice—Absence of malice - 868
*See* CRIMINAL LAW. 4.

—— Malicious injuries to property—Assertion of right - - - - - 556
*See* CRIMINAL LAW. 3.

—— Trespass on grass field—Actual damage 316
*See* CRIMINAL LAW. 7.

**MANDAMUS**—*Licensing Acts—Justices—Hearing and Determination according to Law—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 4.

By 9 Geo. 4, c. 61, s. 4, licensing justices at special transfer sessions have power to license persons, "intending to keep inns theretofore kept by other persons being about to remove from such inns," to sell exciseable liquors by retail. Justices, acting under that section, granted a licence by way of transfer from a person who was not and had not been in occupation of the premises in respect of which he held it, and no exciseable liquors had been sold upon those premises for many years:—

*Held*, that as the justices had disregarded the provisions of the statute giving them jurisdiction, and must have acted upon some considerations altogether outside that statute, they had not heard and determined the matter according to law, and that a mandamus ought to go commanding them so to hear and determine it. THE QUEEN *v.* COTHAM - - - Div. Ct. 802

—— Costs—Practice—Licence—Transfer 503
*See* LICENSING ACTS. 4.

—— Jurisdiction of justices—Power to require witnesses to be sworn - - 578
*See* LICENSING ACTS. 3.

—— Licence—Excess of jurisdiction—Certiorari
*See* LICENSING ACTS. 1. 663

—— To enforce judgment—Delay in commencement of action—Retrospective rate 836
*See* LOCAL GOVERNMENT. 8.

**MARINE INSURANCE.**
*See* Cases under INSURANCE, MARINE.

**MARKET GARDEN** — Rating — Glass-houses — Agricultural land - - - 683
*See* REVENUE. 6.

**MASTER AND SERVANT**—*Contract—Custom as to hiring Domestic Servants—Reasonableness—Notice during first Fortnight—Determination at end of first Month.*

A custom with regard to the hiring of domestic servants, to the effect that, in the absence of special contract, there is a right, on the part of either the master or the servant, to determine the service, at the end of the first calendar month, by notice given at or before the expiration of the first fortnight, is not a notorious custom of which the Courts will take judicial notice; but, where such a custom is relied on, its existence must be proved by evidence in each particular case.

Such a custom is not unreasonable; and therefore, if, in any particular case, its existence were sufficiently proved by evidence, the Court would give effect to it. MOULT *v.* HALLIDAY Div. Ct. 125

—— Factory and Workshop Act 640, 783, 881
*See* FACTORY ACTS. 1, 3, 4.

**MAYOR'S COURT**—Practice—Costs—Libel 513
*See* LONDON. 3.

**MAYOR'S COURT OF LONDON RULES, 1890 and 1892** - - - - - 513
*See* LONDON. 3.

**MERGER**— Prescriptive right—Extinguishment of old franchise by statute - 186
*See* TOLLS.

**METROPOLIS.**
*See* Cases under LONDON.

**MILK**—Adding water to—Malicious injuries to property—Fraudulent motive—Absence of malice - - - - 868
*See* CRIMINAL LAW. 4.

**MILKSHOP**—Dairies, Cowsheds, &c., Order—Power to regulate air-space - 23
*See* LOCAL GOVERNMENT. 3.

**MISCONDUCT**—Arbitrator—Statement of special case—Setting aside award - 131
*See* ARBITRATION.

—— Striking off the rolls—Jurisdiction—Order of Colonial Court - - - 331
*See* SOLICITOR. 2.

**MISDEMEANOR**—Offences against the person—Time of commencing prosecution 174
*See* CRIMINAL LAW. 6.

**MORTGAGE**—Absolute assignment of debt with proviso for redemption—Implication of power to redeem - - - 765
*See* ASSIGNMENT OF DEBT.

—— Settled property—Annuity—Estate duty
*See* REVENUE. 1. 355

—— Transfer of—Stamp—Trust deed for securing debentures - - - 408
*See* REVENUE. 8.

**MUNICIPAL CORPORATION**—*Borough Fund—Appeal against Refusal of Licence—Payment of Costs of Chief Constable—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 140, *sub-ss.* 1–3, *ss.* 141–143, *Sched. V., Part II., clause* 5 (*d*)—*Municipal Corporations* (*Borough Funds*) *Act*, 1872 (35 & 36 *Vict. c.* 91), *s.* 2.

A municipal corporation cannot, where there is no surplus of the borough fund, legally pay thereout costs incurred by the chief constable in opposing by direction of the council appeals against the refusal of justices to renew the licences of publicans.

*Query*, whether, if there be a surplus, it can legally be applied to payment of such costs. ATTORNEY-GENERAL *v.* TYNEMOUTH CORPORATION C. A. 604

—— Election of county council—Death of candidate between nomination and poll 552
*See* LOCAL GOVERNMENT. 2.

—— Separate court of quarter sessions—Liability for costs of - - - - 141
*See* LOCAL GOVERNMENT. 1.

**MUNICIPAL CORPORATIONS ACT, 1882, General Rules, 1883, rr. 48, 57**—Appeal—Interlocutory order - - - 353
*See* PRACTICE. 2.

**MUNICIPAL ELECTIONS (CORRUPT AND ILLEGAL PRACTICES) ACT, 1884** — Appeal—Interlocutory order - 353
*See* PRACTICE. 2.

**MUSIC**—Royal College of—Rates—Exemption—Scientific society - - - 809
*See* LOCAL GOVERNMENT. 7.

**NEGLIGENCE**—Contributory—Neglect to fence machinery — Compensation to injured person - - - - 783
*See* FACTORY ACTS. 3.

—— Costs—Action founded on tort—Contract of agistment—Bailment - - 56
*See* PRACTICE. 3.

**NETS**—Device to catch fish—Salmon - 405
*See* FISHERY.

**NOMINATION** — By member — Revocation by subsequent will - - - 469
*See* FRIENDLY SOCIETY. 2.

**NON-DIRECTION** — County court — Appeal — Practice - - - - 314
*See* COUNTY COURT. 3.

**NONSUIT**—Discontinuance of action - 636
*See* PRACTICE. 6.

**NOTICE**—Abatement—Nuisance—Smoke 342
*See* LOCAL GOVERNMENT. 4.

—— Abatement of nuisance—Service of on person not liable—Recovery of expense from person liable - - - 775
*See* LONDON. 4.

—— Bankruptcy - - 290, 383, 419
*See* BANKRUPTCY. 1—3.

—— Bankruptcy petition—Service—Execution —Sheriff - - - - 256
*See* BANKRUPTCY. 5.

—— Breach of covenant to repair—Right to re-enter - - - - - 276
*See* LANDLORD AND TENANT. 3.

—— Claim for compensation for improvements—Agricultural Holdings Act - 8
*See* LANDLORD AND TENANT. 1.

—— Debt incurred after notice to creditor of act of bankruptcy—"Debt provable in bankruptcy" - - - - 622
*See* BANKRUPTCY. 6.

—— Dishonour—Bank with several branches—Notice to wrong branch - - 268
*See* BILL OF EXCHANGE. 2.

—— Hiring of domestic servants — Custom—Reasonableness - - - 125
*See* MASTER AND SERVANT.

—— Nuisance—Several houses drained by single private drain—Joint notice to several owners to repair - - - 855
*See* LOCAL GOVERNMENT. 5.

—— "Off-licence"—Application for new licence
*See* LICENSING ACTS. 2. 334

—— Service of—London Building Act - 110
*See* LONDON. 1.

—— To set back boundary wall—Forecourt or space - - - - 106
*See* LONDON. 2.

**NUISANCE**—Abatement notice—Service of on person not liable—Recovery of expense from person liable - - - 775
*See* LONDON. 4.

—— Abatement notice—Smoke - - 342
*See* LOCAL GOVERNMENT. 4.

—— Several houses drained by single private drain —Joint notice to several owners to repair - - - - - 855
*See* LOCAL GOVERNMENT. 5.

**OFFENCES**—Keeping open premises during prohibited hours—Theatres - - 114
*See* LICENSING ACTS. 5.

**OFFENCES AGAINST THE PERSON**—Criminal law - - - - 174, 179
*See* CRIMINAL LAW. 5, 6.

**OFF-LICENCE**—Application for new licence—Notice - - - - 334
*See* LICENSING ACTS. 2.

**PARISH COUNCIL**—Custody of parish documents — Justices — Jurisdiction—Order for removal - - - - 164
*See* LOCAL GOVERNMENT. 6.

**PARLIAMENT** — *County Vote — Description of Nature of Qualification—"Dwelling-house joint" —Reform Act*, 1832 (2 & 3 *Will.* 4, *c.* 45), *ss.* 20, 27—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *ss.* 3, 27—*Representation of the People Act*, 1884 (48 & 49 *Vict. c.* 3), *ss.* 2, 5, 7.

The qualification of two persons on the list of voters for a county was described as "dwelling-house joint." Objection was taken on the ground that such a qualification was expressly forbidden by law. The dwelling-house was of more than sufficient value to give 10*l.* a year annual value to each joint occupier:—

*Held*, that the claim, although bad as a claim for the household franchise, was good as a claim for occupation franchise. BAGLEY *v.* BUTCHER AND MERRIMAN - - - **Div. Ct. 67**

2. —— *Election Petition — Particulars — Scrutiny—Claim of Seat—Election Petition Rules*, 1868, *rr.* 6, 7.

Rule 6 of the Election Petition Rules, 1868, does not apply in the case of a claim for the seat for an unsuccessful candidate on the ground that he had a majority of lawful votes. In such a case rule 7 is exclusively applicable, and therefore an order for particulars cannot be made.

*Munro* v. *Balfour*, [1893] 1 Q. B. 113, followed. FURNESS *v.* BERESFORD (YORK ELECTION PETITION) - - - - - **C. A. 495**

**PARTICULARS**—Election petition — Scrutiny—Claim of seat - - - 495
*See* PARLIAMENT. 2.

**PARTIES**—Joinder — Counter-claim — Cause of action against plaintiff by defendant jointly with another person - 798
*See* PRACTICE. 5.

**PASSENGER**—Inspector of weights and measures —Police officer—Conveyance at reduced rate - - - - - 643
*See* RAILWAY. 2.

**PAUPER**—Birth settlement—Loss of—Division of parish in which pauper was born **594**
*See* POOR LAW.

**PAVING** — Street—Highway repairable by inhabitants at large—Frontagers - **45**
*See* LOCAL GOVERNMENT. 10.

**PENALTY**—Executor de son tort—Liability to pay probate duty - - - **205**
*See* REVENUE. 5.

—— For not substituting sufficient road—Interference with road - - - **473**
*See* RAILWAY. 1.

**PETITION** — Bankruptcy — Notice — Service — Execution—Sheriff - - **256**
*See* BANKRUPTCY. 5.

—— Election—Particulars—Scrutiny - **495**
*See* PARLIAMENT. 2.

—— Election—School board—Recount of votes
*See* ELECTION PETITION. **479**

—— School board election—Interlocutory order —Appeal - - - - **353**
*See* PRACTICE. 2.

**POLICE** — Officer — Passenger — Inspector of weights and measures—Conveyance at reduced rate - - - **643**
*See* RAILWAY. 2.

**POLICY**—Marine insurance **27, 32, 739, 821, 829**
*See* INSURANCE, MARINE. 2—6.

**POOR LAW**—*Settlement—Pauper—Birth Settlement—Division of Parish in which Pauper was born—Loss of Birth Settlement*—13 & 14 *Car.* 2, *c.* 12, *s.* 21—*Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *ss.* 1, 3, 8—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 1 *sub-s.* 3, 67, 68, 75.

The decision in *Reg.* v. *Inhabitants of Tipton*, (1842) 3 Q. B. 215, as to the settlement of paupers, established the rule that the settlement in a parish gained by birth therein is a settlement in the parish as an entity, and not in any particular township of it, and if after a birth settlement has been gained in it the parish is divided by Act of Parliament into two or more separate parishes, so that it ceases to exist as one entire parish, the birth settlement gained in the old parish ceases to exist also.

This rule has been so long established and so frequently applied, that it cannot now be altered by the Court; and accordingly it was applied by the Court of Appeal, affirming the decision of Collins and Ridley JJ., in the case of a parish which had become two separate parishes by the operation of the Local Government Act, 1894, s. 1, sub-s. 3. DORKING UNION *v.* ST. SAVIOUR'S UNION - - - **C. A. 594**

**POSSESSION** — Joinder of claim for possession and claim for rent - - - **276**
*See* LANDLORD AND TENANT. 3.

**PRACTICE**—*Appeal—Case stated under Quarter Sessions Act*, 1849 (12 & 13 *Vict. c.* 45), *s.* 11—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 19.

The entry of judgment in an appeal at quarter sessions in accordance with the decision of a Divisional Court on a case stated under the Quarter Sessions Act, 1849, s. 11, does not prevent an appeal against the decision to the Court of Appeal under the Judicature Act, 1873, s. 19.

*Corporation of Peterborough* v. *Wilsthorpe Overseers*, (1883) 12 Q. B. D. 1, and *Holborn Guardians* v. *Chertsey Guardians*, (1885) 15 Q. B. D. 76, followed. LODGE *v.* HUDDERSFIELD CORPORATION - - - - **C. A. 859**

**2.** —— *Appeal—School Board Election—Petition—Interlocutory Order — Appeal to Court of Appeal — Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *Part IV., s.* 93, *sub-s.* 7 — *Municipal Elections (Corrupt and Illegal Practices) Act*, 1884 (47 & 48 *Vict. c.* 70), *s.* 36—*General Rules*, 1883, *for the Execution of Part IV. of the Municipal Corporations Act*, 1882, *rules* 48, 57.

From an order of a judge at chambers in an interlocutory application arising in a school board election petition an appeal lies to the Court of Appeal. LORD MONKSWELL *v.* THOMPSON - - - - - **C. A. 353**

**3.** —— *Costs — Action founded on Tort — Contract of Agistment—Bailment—Negligence—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

An action founded on the common law liability of a bailee is an action founded on tort within the meaning of s. 116 of the County Courts Act, 1888. TURNER *v.* STALLIBRASS - **C. A. 56**

**4.** —— *Costs—Application for Judgment under Order XIV. — Leave to Defend — Case remitted to County Court — Costs of Application under Order XIV. to be Costs in the Cause — County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 116 — *Rules of the Supreme Court, Order XIV., r.* 9 (*a*).

In an action to recover under a contract a sum above 20*l.*, but less than 50*l.*, the plaintiff applied for judgment under Order XIV. The defendant obtained leave to defend on payment of the amount claimed into court, and the money was paid in. An order was subsequently made on the application of the plaintiff, and affirmed by a judge at chambers, remitting the action to the county court, and directing that the costs of the application under Order XIV. should be costs in the cause. On appeal:—

*Held*, that as the case was not brought within s. 116 of the County Courts Act, 1888, or Order XIV., r. 9 (*a*), there was no jurisdiction to make the order as to the costs of the application under Order XIV.

*Quære*, whether an order purporting to make costs under Order XIV. costs in a county court action could be made at the hearing under Order XIV., r. 9 (*a*). DUNN *v.* APPLETON **C. A. 564**

**5.** —— *Counter-claim—Cause of Action against Plaintiff by Defendant jointly with another Person—Joinder of Parties—Rules of the Supreme Court, Order XVI., r.* 11; *Order XXI., r.* 11.

The defendant in an action counter-claimed in respect of a cause of action which he claimed to have jointly with another person against the plaintiffs, joining that other person with the plaintiffs as a co-defendant to the counter-claim:—

*Held*, that the rules did not admit of such a

**PRACTICE**—*continued.*

counter-claim, and therefore it must be struck out. PENDER *v.* TADDEI - - C. A. 798

6. —— *Discontinuance of Action—Nonsuit—Rules of the Supreme Court, Order XXVI., rr.* 1–4.

Under the existing rules of procedure a plaintiff cannot elect to be nonsuited. The only way in which an action can be discontinued is by discontinuance under Order XXVI., r. 1. FOX *v.* STAR NEWSPAPER COMPANY - - C. A. 636

7. —— *Discovery — Documents — Privilege — Documents in Previous Action — Secondary Evidence.*

The defendant in an action to try a right of fishery, after judgment had been given for the plaintiff, accidentally discovered certain documents prepared for the defence of a previous action dealing with the same subject-matter, which action was defended at the cost of a predecessor in title of the plaintiff's. The plaintiff obtained possession of the documents after copies of them had been taken by the defendant. The defendant having appealed:—

*Held*, (1.) following *Minet* v. *Morgan*, (1873) L. R. 8 Ch. 361, that the documents remained privileged, (2.) following *Lloyd* v. *Mostyn*, (1842) 10 M. & W. 478, that the defendant was not precluded on the ground of privilege from giving secondary evidence of their contents.

*Wheeler* v. *Le Marchant*, (1881) 17 Ch. D. 675, is not inconsistent with *Minet* v. *Morgan*. CALCRAFT *v.* GUEST - - - C. A. 759

8. —— *District Registry, Action in—Setting aside Judgment in Default of Appearance—Jurisdiction of Registrar—Rules of the Supreme Court, Order XXXV., rr.* 1–6.

A district registrar has by virtue of Order XXXV., r. 6, jurisdiction concurrent with that of a master under the rules to set aside or vary a final judgment signed in default of appearance in an action proceeding in the district registry.

*Hood & Sons* v. *Yates*, [1894] 1 Q. B. 240, commented upon. TOWNEND *v.* KIRKHAM C. A. 51

9. —— *Joinder of Defendants—Separate Causes of Action against all and against some of Defendants—Rules of the Supreme Court, Order XVI., r.* 5; *Order XVIII., rr.* 1, 8.

Where several defendants are sued, a claim for damages in respect of a tort alleged against some of them cannot be combined with a claim for damages in respect of a separate tort alleged against all. GOWER *v.* COULDRIDGE C. A. 348

10. —— *Service—Substituted Service—Writ of Summons—Defendant out of Jurisdiction—Rules of the Supreme Court, Order IX., r.* 2.

Where a writ for service within the jurisdiction was issued against a defendant who was then within the jurisdiction, but, after the writ had come to his knowledge, went out of the jurisdiction, though not for the purpose of evading service:—

*Held*, by the Court of Appeal (Lord Halsbury L.C. and Collins L.J., Rigby L.J. dissenting), that an order for substituted service of the writ might be made under Order IX., r. 2, the circumstances of the case shewing that it would be just to make such an order.

**PRACTICE**—*continued.*

*Fry* v. *Moore*, (1889) 23 Q. B. D. 395, and *Wilding* v. *Bean*, [1891] 1 Q. B. 100, distinguished. JAY AND ANOTHER *v.* BUDD C. A. 12

11. —— *Service of Writ—Defendant Domiciled or Ordinarily Resident in Scotland—Agreement that Writ may be Served upon Agent in England—Rules of the Supreme Court, Order IX., rr.* 1, 2.

An agreement by a person domiciled or ordinarily resident in Scotland, that a writ for breach of contract may be served by leaving it with an agent in England, appointed by him to accept service, is valid, and service upon the agent is good service on the defendant.

*Tharsis Sulphur Co.* v. *Société Industrielle des Métaux*, (1889) 58 L. J. (Q.B.) 435; 60 L. T. 924, approved. MONTGOMERY, JONES & Co. *v.* LIEBENTHAL & Co. - - - C. A. 487

12. —— *Staying Action—Frivolous and vexatious Action—Interlocutory Application in County Court—Subsequent Action in High Court raising some Question.*

In an action in a county court judgment was recovered for a sum of money and costs, but before the costs were taxed the plaintiff agreed, on a representation of the poverty of the defendant, to accept a smaller sum than that for which judgment had been given, and executed a deed releasing the defendant from the judgment debt and costs. Subsequently the plaintiff carried in his bill of costs, and applied to the county court judge for an order to tax, upon the ground that the release had been obtained by misrepresentation. The judge, after hearing evidence, found that the execution of the deed had been obtained by misrepresentation, and made an order that the costs should be taxed, and should be paid together with the balance remaining due under the judgment. The defendant in that action thereupon brought the present action in the High Court for a declaration that he had been released from the judgment debt and costs, and for an injunction to restrain further proceedings to enforce payment thereof:—

*Held*, that as the question raised in this action was identical with that decided by the county court judge upon the interlocutory application, and had been decided by a court of competent jurisdiction, the action ought to be stayed as frivolous and vexatious and an abuse of the process of the Court. STEPHENSON *v.* GARNETT - - - - C. A. 677

—— Appeal—Non-direction - - 314
*See* COUNTY COURT. 3.

—— Joinder of claim for possession and claim for rent - - - - 276
*See* LANDLORD AND TENANT. 3.

**PRESCRIPTION**—Extinguishment of old franchise by statute - - - 186
*See* TOLLS.

**PREVENTION OF CRUELTY TO CHILDREN**—Proof of age of child - - 179
*See* CRIMINAL LAW. 5.

**PRINCIPAL AND AGENT**—*Authority—Holding out Person as having Authority—Evidence for Jury—Stockbroker—Course of Business.*

The defendants, a firm of stockbrokers, had in their employ a clerk, to whom they allowed

**PRINCIPAL AND AGENT**—*continued.*

commission upon orders introduced by him to them and accepted by them, but who was not authorized himself to accept orders on their behalf. On three occasions the plaintiff gave orders to the clerk for the purchase of shares by the defendants on the plaintiff's behalf, which orders were transmitted by the clerk to the defendants, who executed them and sent to the plaintiff bought notes in respect of the shares so purchased. No intimation was given by the defendants to the plaintiff that they accepted the orders prior to their execution by the defendants. In payment of the price of the first two lots of shares purchased the plaintiff drew a cheque payable to defendants' order which he gave to the clerk, who delivered it to the defendants. The third lot of shares was paid for by the plaintiff in a similar manner, with the exception that the cheque was drawn to the order of the clerk. The defendants received the cheques and credited the plaintiff with the amount of them. Orders for the purchase of other shares by the defendants were subsequently given by the plaintiff to the clerk, who did not transmit them to the defendants, but made out and handed to the plaintiff bought notes purporting to shew purchases of shares in pursuance of the orders, and to be signed by the defendants, which were forgeries. The plaintiff gave him cheques for the supposed prices of the shares, which he misapplied to his own use:—

*Held* (by A. L. Smith L.J. and Chitty L.J., Collins L.J. dissenting), that upon the abovementioned facts there was no evidence for a jury of a holding out by the defendants to the plaintiff of the clerk as authorized to enter into contracts on their behalf, and, therefore, the defendants were not liable in respect of the orders subsequent to the first three. SPOONER *v.* BROWNING C. A. 538

2. —— *Indemnity—Broker—Stock Exchange—Wrongful Sale by Broker.*

A stockbroker who on behalf of a principal buys stock upon the Stock Exchange for the next settling day, and without authority from his principal, and contrary to the agreement between them, sells the stock before that day at a loss, cannot claim indemnity from his principal.

The plaintiff, a stockbroker, having prior to November 10 bought stock of a railway company for the defendant on the London Stock Exchange, it was agreed between them that the plaintiff should take part of the stock so purchased off the market by paying for it with money advanced by him for the purpose, which he accordingly did, and that he should hold that stock as security for his advance with interest, and should not sell the same before the account of November 26. On November 10 the plaintiff by the defendant's instructions carried over the residue of the stock till November 26, and bought a further amount of stock for that day. On November 19 the plaintiff, without the defendant's authority, and contrary to his agreement, sold the whole amount of stock purchased at a loss in order to close the account between them. If the stock had been sold on November 26, it would have realized a price higher than that at which the plaintiff sold, but lower than that at which he had bought it for the defendant. In an action by the plaintiff against the defendant for indemnity in respect of the difference between the prices at which he had bought and sold the stock:—

*Held*, first, as to the plaintiff's claim in respect of the stock paid for and taken off the market by the plaintiff as before mentioned, that the plaintiff was entitled to recover as for money paid for the defendant at his request, subject to the defendant's right to counter-claim damages for the loss occasioned by the plaintiff's wrongfully selling the stock before November 26:—

*Held*, secondly, as to the plaintiff's claim in respect of the stock carried over and that which was purchased on November 10 as before mentioned (by A. L. Smith L.J. and Collins L.J., Rigby L.J. dissenting), that no action for indemnity was maintainable, the loss having arisen, not through any breach of contract by the defendant, but through the wrongful sale by the plaintiff.

By Rigby L.J., in affirmance of Mathew J., that the plaintiff was entitled to be credited in account with the price at which he purchased for the defendant, being charged by way of damages with the loss arising from the wrongful sale.

*Duncan* v. *Hill*, (1873) L. R. 8 Ex. 242, and *Lacey* v. *Hill*, *Scrimgeour's Claim*, (1873) L. R. 8 Ch. 921, discussed. ELLIS *v.* POND C. A. 426

—— Foreign principal—Income tax—Exercising trade in United Kingdom - - 326
*See* REVENUE. 4.

**PRIVATE STREET WORKS ACT, 1892**—Sewering - - - - - 294
*See* LOCAL GOVERNMENT. 11.

**PRIVILEGE**—Discovery—Documents in previous action—Secondary evidence - 759
*See* PRACTICE. 7.

**PROBATE DUTY**—Executor de son tort—Liability to pay duty - - - 205
*See* REVENUE. 5.

**PROHIBITION** — *Company—Winding-up—Stannaries Court — County Court — Jurisdiction — Committal for Contempt—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 1, *sub-s.* 6—*Stannaries Court (Abolition) Act*, 1896 (59 & 60 *Vict. c.* 45), *s.* 1—*County Court Rules*, 1889, *Order* XXV., *r.* 40 (*b*).

By the Companies (Winding-up) Act, 1890, s. 1, sub-s. 6, it is provided that every Court having jurisdiction under that Act to wind up a company shall, for the purposes of that jurisdiction, have all the powers of the High Court. The judge of a county court, to which the abovementioned provision applied, having made an order of committal for disobedience of an order made by him in the course of the winding-up of a company, an application was made for a prohibition to him on the ground that the provisions of Order XXV., r. 40 (*b*), of the County Court Rules, 1889, with regard to service of the order sought to be enforced, had not been complied with, and he therefore had not jurisdiction to make an order for committal:—

*Held*, that, inasmuch as the county court judge was invested for the purposes of the

**PROHIBITION**—*continued.*
winding-up jurisdiction with the powers of the High Court, a prohibition to him could not be granted. *In re* The New Par Consols, Limited (No. 2) - - - - - **C. A. 669**

**PROOF**—Age of child—Prevention of cruelty to children - - - - **179**
*See* Criminal Law. 5.

—— "Debt provable in bankruptcy" — Debt incurred after notice to creditor of act of bankruptcy - - - - **622**
*See* Bankruptcy. 6.

—— Onus of—Recount of votes—Correctness of returning officer's figures - - **479**
*See* Election Petition.

**PUBLIC HEALTH ACT, 1875 - 45, 342, 463, 836, 855**
*See* Local Government. 4, 5, 8, 10, 12.

**PUBLIC HEALTH (LONDON) ACT, 1891** — Nuisance—Abatement notice — Service of, on person not liable—Recovery of expense - - - - **775**
*See* London. 4.

**PUBLIC-HOUSE.**
*See* Cases under Licensing Acts.

—— Goodwill—Conveyance on sale—Stamp **226**
*See* Revenue. 7.

—— Tied—Initial valuation—Trade interest
*See* London. 6. **387**

**QUALIFICATION** — County vote — "Dwelling-house joint" - - - **67**
*See* Parliament. 1.

**QUANTUM MERUIT**—Right to sue on—Abandonment of contract—Evidence of new contract - - - - **673**
*See* Contract.

**QUARTER SESSIONS** — Appeal — Case stated under Quarter Sessions Act, 1849 **859**
*See* Practice. 1.

—— Separate court of—Liability for costs of—County council - - - **141**
*See* Local Government. 1.

**RAILWAY**—*Interference with Road—Penalty for not substituting sufficient Road—Road belonging to Different Owners—Right of Owner of Part to Sue for Penalty—Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 53, 54.

By s. 53 of the Railways Clauses Act, 1845, if a railway company, in the exercise of their powers, find it necessary to cut through, raise, sink, or use any part of any road, either public or private, so as to render it impassable or dangerous, they shall, before commencing such operations, cause a sufficient road to be made instead of the road to be interfered with; and by s. 54 they are, in default of so doing, liable to a penalty which, in the case of a private road, shall be paid "to the owner thereof":—

*Held*, that the owner of the soil of any part of that portion of a private road which has been interfered with may sue to recover the penalty, but that only one such penalty is recoverable from the railway company.

**RAILWAY**—*continued.*
Decision of Wright J., [1897] 2 Q. B. 239, affirmed. Llewellyn *v.* Vale of Glamorgan Railway Company - - - **C. A. 473**

2. —— *Passenger—Inspector of Weights and Measures—Police Officer—Conveyance at Reduced Rate—Cheap Trains Act*, 1883 (46 & 47 *Vict. c.* 34), *s.* 6.

A police officer, appointed by the county council an inspector of weights and measures, is not entitled, when travelling as such inspector, to conveyance at the reduced rate provided by s. 6 of the Cheap Trains Act, 1883, for the conveyance of the police on occasions of the public service. Spencer *v.* Lancashire and Yorkshire Railway Company - - - **Div. Ct. 643**

3. —— *Regulation—Charge for Use of Sidings—Right of Action—Jurisdiction of Court—Arbitration—Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25)—*Provisional Order.*

By a Provisional Order, made by the Board of Trade under the Railway and Canal Traffic Act, 1888, a railway company were empowered to charge, in addition to the tonnage rate, a reasonable sum for the service, if rendered to a trader at his request or for his convenience, of allowing him "the use or occupation of any accommodation, before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof," and "any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party." The company gave notice to the defendant, a trader, that they would allow him four days, free of charge, within which to unload goods consigned to him arriving at their station, and that after the expiration of the four days they would charge him 6*d.* per day siding rent for each wagon allowed to remain unloaded. In an action by the company to recover from the defendant siding rent at the rate of 6*d.* per day in respect of wagons which, after receiving that notice, he had allowed to remain unloaded after the four days, the defendant disputed the reasonableness of the amount charged:—

*Held*, that the Provisional Order did not apply to oust the jurisdiction of the Court to try the action. London and North Western Railway Company *v.* Donellan - **Div. Ct. 748**

—— Accident to—Charterparty—Exceptions
*See* Ship. 4. **261**

**RATES**—*Sewers, Commissioners of—Sewers Rate—Principle of Assessment.*

A sewers rate ought to be assessed equally, according to their value, on all lands and tenements within the drainage district which derive any benefit from the drainage works, and not differentially in proportion to the amount of the benefit which they respectively derive.

Opinion expressed to the contrary in *Metropolitan Board of Works* v. *Vauxhall Bridge Co.*, (1857) 7 E. & B. 964, overruled. Knight *v.* Langport District Drainage Board **Div. Ct. 588**

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**RE-INSURANCE**—"Covering note"—Contract for sea insurance not expressed in policy —Invalidity - - - 829
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*See* LANDLORD AND TENANT. 3.

—— Last receipt for—Reasonable excuse for non-production - - - - 543
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**REPAIRS**—Covenant—Notice of breach—Right to re-enter - - - - 276
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**REPAIRS**—*continued.*

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**RESCISSION** — Receiving order — Arrangement with creditors—Discretion - 241
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**RETAINER**—In specie—Debt due to executor—Insolvent testator - - - 282
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**REVENUE** — *Estate Duty—Mortgage of Settled Property — Mortgage by Tenant for Life and Tenant in Tail—Annuity to Tenant in Tail—Cesser of Annuity on Death of Tenant for Life—Value of Property passing on Death of Tenant for Life—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*b*); *s.* 7, *sub-s.* 1 (*a*), *sub-s.* 7 (*b*).

Property being settled upon a father for life with remainder to his son in tail, the father mortgaged his life interest, and subsequently the father and son joined in executing a disentailing assurance whereby they settled the property to such uses as they should jointly appoint, and subject thereto in the same manner as it was theretofore settled. The father and son jointly borrowed money on mortgage of the settled property, and under their joint power appointed, and as beneficial owners conveyed, the property to the mortgagees. The existing mortgage of the father's life interest was transferred to the new mortgagees as a further security for their advance. The balance of the money borrowed, after paying off the prior mortgagee, was paid in part to the father and in part to the son. Subsequently, by an indenture of resettlement, the father charged his life interest with the payment during his life of an annuity to the son. In 1895, while the mortgage was still subsisting, the father died, and the son succeeded to the equity of redemption of the settled property:—

*Held*, that for the purpose of computing the value of the property passing on the death of the father and liable to estate duty under the Finance Act, 1894, no deduction should be made from the gross value of the settled property in respect of any part of the mortgage debt, or in respect of the capitalized value of the annuity. *In re* EARL COWLEY'S ESTATE - - - C. A. 355

2. —— *Estate Duty—Settlement—Reservation of Interest to Settlor—Extent of Liability to Duty on Death of Settlor—Conditional Power of Revocation of Settlement—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*)—*Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2, (*a*), (*c*)—*Customs and Inland Revenue Act*, 1889 (52 & 53 *Vict. c.* 7), *s.* 11.

By a deed made in 1885 the owner of certain estates gave them to his nephew in fee subject to the reservation of an annual rent-charge payable to the donor and expressed to be issuing out

**REVENUE**—*continued.*

of the estates so given. The deed also provided that in certain events the donor should be at liberty to revoke the deed.

The annual income of the estates was considerably in excess of the rent-charge. After the commencement of Part I. of the Finance Act, 1894, and before the happening of any of the events upon which the power of revocation was exercisable, the donor died:—

*Held*, (1) That the whole of the estates were "property passing under a .... settlement .... whereby an interest in such property for life .... (was) reserved .... to the settlor" within the meaning of s. 38, sub-s. 2 (*c*), of the Customs and Inland Revenue Act, 1881, and that estate duty was payable under the Finance Act, 1894, upon the principal value of the whole.

(2) That the donor of the estates had by the deed "reserved to himself the right .... to restore to himself .... the absolute interest in such property" within the meaning of the same sub-section none the less because the conditions upon which the right was exercisable had not happened. ATTORNEY-GENERAL *v.* EARL GREY
**Div. Ct. 318**

3. —— *Income Tax—Deductions—Balance of Profits and Gains—Brewery Business—Repairs to Tied Houses—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. D.*

The provision of s. 100, case 1, rule 3, of 5 & 6 Vict. c. 35, which authorizes a deduction, in estimating the balance of profits and gains of a trade, in respect of the expenditure on repairs of "premises occupied for the purpose of such trade," applies only to premises occupied by the person assessed for the purpose of his trade.

The appellants, a firm of brewers, in order to increase their trade, purchased licensed houses which they let to tenants who contracted to buy from them all the beer, wines, and spirits to be sold therein. By reason thereof the appellants' profits had been materially increased. The repairs to these houses were executed and paid for by the appellants, and they claimed in arriving, for the purpose of the income tax, at the balance of the profits and gains of their trade, to be entitled to a deduction in respect of the sum expended on those repairs:—

*Held*, that the appellants were not entitled to any deduction in respect thereof. BRICKWOOD & CO. *v.* REYNOLDS - - - - **C. A. 95**

4. —— *Income Tax—Exercising Trade in United Kingdom—Foreign Principal—Consignment of Goods from Abroad to Agent here for Sale—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34)—*Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35).

Foreign principals were in the habit of consigning goods to agents in this country for sale. The agents, who invoiced the goods to their purchasers in their own names and guaranteed payment by the purchasers, remitted to their principals the proceeds of the sales less their charges and commission. On a claim by the Crown against the foreign principals for income tax:—

*Held*, that though there might be a presumption as between the agents and their purchasers that the agents and not the foreign principals were the vendors, there was no corresponding presumption as between the foreign principals and the agents that the property in the goods had passed from the principals to the agents; that the sales by the agents in this country were as between them and their principals made on behalf of the principals, and that the principals were consequently liable to income tax as exercising a trade within the United Kingdom within the meaning of s. 2, Sched. D, of the Income Tax Act, 1853. WATSON *v.* SANDIE & HULL
**Div. Ct. 326**

5. —— *Probate Duty—Testator resident and domiciled Abroad—Executor de son Tort—Intermeddling with Estate—Liability to pay Probate Duty—Penalties—55 Geo.* 3, *c.* 184, *s.* 37—*Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 40.

Upon the death of a testator, resident and domiciled in America, shares and debentures in an English company, of which he was the registered holder in the books of the company in London, passed by his will according to the law of his domicil to his executors in America. At their request the company registered them as the holders of two shares and a debenture in the place of the deceased, and paid to them the dividends and interest due upon the shares and debentures at the time of the testator's death. The executors, to the knowledge of the company, had not obtained, and did not intend to obtain, probate of the will in England:—

*Held*, that the company, by so dealing with the assets of the testator in England, constituted themselves executors de son tort, and were liable, upon an information filed by the Attorney-General, to pay to the Crown probate duty upon the assets so administered by them.

*Semble*, that the company, by so doing, had "taken possession of and administered" part of the deceased's personal estate in England within the meaning of s. 37 of 55 Geo. 3, c. 184, without having taken out probate, and were liable to penalties under that section. ATTORNEY-GENERAL *v.* NEW YORK BREWERIES COMPANY - **C. A. 205**

6. —— *Rating—Market Garden—Glass-houses—"Agricultural Land"—"Buildings"—Agricultural Rates Act*, 1896 (59 & 60 *Vict. c.* 16), *ss.* 1, 5, 6, 9—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 3.

Upon an appeal from Collins and Ridley JJ. (who differed), it was held by Lindley M.R. and Rigby L.J., Vaughan Williams L.J. dissentiente, that according to the true construction of the Agricultural Rates Act, 1896, glass-houses in or on a market garden, if buildings, must be rated as buildings and not as agricultural land. SMITH *v.* RICHMOND - - - - **C. A. 683**

7. —— *Stamp—Conveyance on Sale—Agreement for Sale—Ad valorem Duty—Leasehold Interest in Licensed House—Goodwill—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1.

By s. 59, sub-s. 1, of the Stamp Act, 1891, "any contract or agreement made in England or Ireland under seal, or under hand only .... for the sale of any equitable estate or interest in any

**REVENUE**—*continued.*

property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments or heritages . . . . or goods wares or merchandise . . . . shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

By an agreement under seal the vendor agreed to sell the goodwill of the business of an hotel proprietor and licensed victualler, and the lease of the hotel in which the business was carried on, together with the household furniture, stock-in-trade, cash, and book debts; of the total consideration 4085*l.* was apportioned to "lease and goodwill," 1462*l.* to furniture, stock-in-trade, and cash, and 37*l.* to book debts. The vendor was to shew a good title to the lease and to assign the lease and goodwill to the purchasers; in the event of the consent of the landlords to the assignment of the lease not being obtained, it was provided that the vendor should, at the option of the purchasers, execute a declaration of trust of the leasehold premises in their favour. The consent of the landlords not having been obtained, a declaration of trust was executed in favour of the purchasers, which was stamped with the fixed duty of 10*s.*:—

*Held*, (1.) that the agreement was not an agreement for the sale of an equitable interest in property within the meaning of s. 59, sub-s. 1; (2.) that, inasmuch as the goodwill was incapable of being severed from the enjoyment of the leasehold premises, the instrument was not an "agreement for the sale of an estate or interest in any property except lands," and was therefore not liable to ad valorem duty upon that portion of the consideration attributed to "lease and goodwill"; (3.) that it was liable to ad valorem duty upon the amount of the book debts only. WEST LONDON SYNDICATE, LIMITED *v.* INLAND REVENUE COMMISSIONERS - - - **Div. Ct. 226**

8. —— *Stamp — Mortgage — Trust Deed for securing Debentures—Transfer of Mortgage—Substituted Security—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 86, *sub-s.* 1; *s.* 88, *sub-s.* 1; *Sched. I.*

A limited company issued in 1892 500,000*l.* 4 per cent. debenture stock, secured by a trust deed which was duly stamped. By a subsequent trust deed for securing debenture stock made in 1897, and having the same trustees, after reciting that the 500,000*l.* debenture stock was still outstanding and that the company was intending to issue further irredeemable 3½ per cent. debenture stock, the amount of stock to be issued was limited in the first instance to 300,000*l.*, the company acknowledging in the deed that they were indebted to the trustees in that sum carrying interest at 3½ per cent. The company were to be at liberty to issue further 3½ per cent. debenture stock not exceeding 540,000*l.*, making a total of 840,000*l.*; such further stock was only to be issued for the purpose of redeeming or paying off the 500,000*l.* 4 per cent. stock at the rate of not more than 108*l.* of the new stock for every 100*l.* of the stock redeemed or paid off. Before issuing any of the further debenture stock the company were to execute and deliver to the

**REVENUE**—*continued.*

trustees an acknowledgment of indebtedness for the amount of the further proposed issue, and the trustees were to certify on the trust deed that the company were entitled to make the issue:—

*Held*, first, that the trust deed was a security for the repayment of 840,000*l.* advanced or to be advanced within the meaning of s. 86, sub-s. 1, and s. 88, sub-s. 1, of the Stamp Act, 1891, notwithstanding that certain preliminaries must necessarily be complied with before the issue of any further stock in excess of 300,000*l.*; and, secondly, that in respect of 500,000*l.* the deed was not a transfer of a mortgage, but was a substituted security, and was therefore only liable to the reduced ad valorem duty of 6*d.* per cent. under the heading "Mortgage, Bond, Debenture, Covenant" in the 1st schedule to the Stamp Act, 1891. CITY OF LONDON BREWERY COMPANY *v.* INLAND REVENUE COMMISSIONERS - **Div. Ct. 408**

9. —— *Stamp Duty—Foreign Security issued in United Kingdom—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 82, *sub-s.* 1 (*b*), (i.).

A security is not issued within the meaning of the Stamp Act, 1891, s. 82, sub-s. 1 (*b*), (i.), until it becomes a legally effective instrument.

A railway company in the United States had issued bonds secured by a mortgage of the company's property, many of which were in the hands of holders in England. The interest on the bonds being in arrear, a scheme of reorganisation was set on foot under which the property of the company was to be vested in a new railway company, which was to be formed, and was to issue in exchange for the bonds of the old company new bonds to be secured by a mortgage of the new company's property to a trust company in New York as trustee for the bondholders. A new company was formed in which the property of the old company was vested in pursuance of the scheme. By the terms of a deed of mortgage and trust executed by the new company in pursuance of the scheme the new bonds were, when executed by the new company, to be delivered to the trust company to be certified by it, and only such bonds as bore indorsed upon them the trust company's certificate duly signed were to be secured by the mortgage. Bonds payable to bearer were in pursuance of the scheme executed and delivered by the new company to the trust company in New York, each bond containing a clause which provided that the bond should not be valid for any purpose unless authenticated by the certificate indorsed thereon of the trust company. In the case of the new bonds to be delivered to bondholders of the old company in this country, the certificates indorsed on the new bonds were not signed by the trust company in New York, but the vice-president of the trust company came over to London and signed them there. The bonds were then delivered to the bondholders of the old company in this country:—

*Held*, that the new bonds so issued were marketable securities by or on behalf of a foreign company issued in the United Kingdom within the meaning of the Stamp Act, 1891, s. 82, sub-s. 1 (*b*), (i.). BARING *v.* INLAND REVENUE COMMISSIONERS - - - - - **C. A. 78**

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—— **Order XVI., r. 5** (Parties) - - 348
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**SECURITY**—Omission to value—Inadvertence—Secured creditor - - - 627
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—— Notice during first fortnight—Determination—Custom—Reasonableness - 125
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**SERVICE**—Agreement that writ may be served upon agent in England - - 487
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—— Execution—Sheriff—Notice of bankruptcy petition - - - - 256
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—— Notice—Abatement of nuisance—Service on person not liable—Recovery of expense - - - - 775
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**SHERIFF**—Execution—Notice of bankruptcy petition—Service - - - 256
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—— Sale of goods by—Execution - - 37
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**SHIP**—*Bill of Lading—Exemption of Shipowner from Liability—"Defects latent on beginning voyage or otherwise."*

A bill of lading contained among other exemptions one by which the shipowner was not to be liable for loss or damage arising from "defects latent on beginning voyage or otherwise":—

*Held*, that although this would cover latent defects which might either exist at the commencement of the voyage or occur during the course of the voyage, it would not cover defects which were obvious at the commencement of the voyage. OWNERS OF CARGO ON BOARD SS. WAIKATO *v.* NEW ZEALAND SHIPPING COMPANY **Bigham J. 645**

2. —— *Bill of Lading—Implied Warranty—Bullion-room—Fitness to resist Thieves.*

Boxes of gold, shipped abroad, under a bill of lading, for delivery in London, were placed in the bullion-room of the ship from which one of the boxes was stolen during the voyage. The bill of lading did not contain any mention of a bullion-room, but it was known to the plaintiffs that the defendants' vessels were provided with such rooms, and it was in the contemplation of both parties to the contract that the gold was to be carried in a bullion-room:—

*Held*, affirming the judgment of Mathew J., that there was an implied warranty that the bullion-room in which the gold was stowed was so constructed as to be reasonably fit to resist thieves. QUEENSLAND NATIONAL BANK, LIMITED *v.* PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY - - - - **C. A. 567**

3. —— *Bill of Lading—Incorporation of Conditions of Charterparty—"Freight and all other Conditions as per Charterparty"—Limitation to Conditions to be performed by Consignee.*

By a charterparty a vessel was to load a full cargo of timber, including a deck cargo at merchant's risk. Timber was loaded under a bill of lading which contained no reference to deck cargo, but in which there was a clause "freight and all other conditions as per charterparty." In an action for freight by the shipowner against the consignees of a part of the cargo which had been carried on deck, the defendants counterclaimed for damage to their cargo:—

*Held* (by A. L. Smith and Collins L.JJ., Rigby L.J. dissenting), that the conditions of the charterparty incorporated into the bill of lading were limited to such as were to be performed by the consignee, and did not include the exemption of the shipowner from liability in respect of deck cargo. DIEDERICHSEN *v.* FARQUHARSON BROTHERS **C. A. 150**

4. —— *Charterparty—Exceptions—Delay—Lock-out—Accident to Railway—Other Causes beyond Charterer's Control—Causes ejusdem generis with Antecedent Exceptions.*

A ship was chartered to proceed to Batoum, and there load with oil from a named factory, and at a specified rate per day. The charterparty excepted, among other things, "strikes, lock-outs, accidents to railway," and also "other causes beyond charterer's control." Oil is brought to Batoum by a railway, which was injured by floods so that no oil could be sent down, and the workmen of the factory were discharged, there being no employment for them. Subsequently to the arrival of the ship in port the railway was repaired, and oil arrived in sufficient quantity to load her; but there was delay in doing so, because the workmen who had been discharged could not be got together in sufficient numbers, and such men as were there were employed in loading other vessels according to the order of their arrival, as was the practice of shippers at that port. On a claim for damages for detention of the ship:—

*Held*, that the general clause excepting "other causes beyond charterer's control" referred to matters ejusdem generis with the antecedent exceptions, and that the delay in loading the ship after the arrival of the oil could not be attributed to accident to the railway, or to anything ejusdem generis with a lock-out, which was confined to the dismissal of workmen arising out of a trade dispute. *In re* RICHARDSONS AND M. SAMUEL & Co. - - - - **C. A. 261**

—— Marine insurance—Policy **27, 32, 739,** *See* INSURANCE, MARINE. **2—6. 821, 829**

—— Seamen—Intimidation—Conspiracy and protection of property - - - **61** *See* CRIMINAL LAW. **2.**

**SIDINGS**—Charge for use of—Right of action—Arbitration - - - - **748** *See* RAILWAY. **3.**

**SMOKE**—Nuisance—Abatement notice - **342** *See* LOCAL GOVERNMENT. **4**

**SOLICITOR**—*Costs—Charging order—Property Recovered or Preserved—Bankruptcy—Jurisdiction—Discretion—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Bankruptcy Rules*, 1886, *r.* 125.

To bring a case within s. 28 of the Solicitors Act, 1860, property must be recovered or preserved in a proceeding in a court of justice.

The appellants were the solicitors to the trustee of a bankrupt's estate. The bankrupt had sold his stock-in-trade, and gone with the proceeds of the sale to Australia. He was arrested there, and brought back to this country on a charge of offences against the Debtors Act, 1869, preferred by order of a court of bankruptcy made under s. 16 of that Act upon the application of the appellants on behalf of the trustee. On the bankrupt's arrest a sum of money, the proceeds of the before-mentioned sale, was found upon him, and taken possession of by the Australian police. Under a power of attorney prepared by the appellants, as solicitors to the trustee, this money was handed over by the police and remitted to the appellants in this country:—

*Held*, that this money was not property recovered or preserved in the bankruptcy proceedings or any other legal proceeding within the meaning of s. 28 of the Solicitors Act, 1860, and therefore that an order could not be made under that section, charging the appellants' costs upon it.

The power given by the section is discretionary, and, *semble*, the cases in which it ought to be exercised by a court of bankruptcy must be

**SOLICITOR**—*continued.*

rare. *In re* HUMPHREYS. *Ex parte* LLOYD-GEORGE & GEORGE - - - **C. A. 520**

2. —— *Misconduct—Application to strike off the Rolls—Jurisdiction—Order of Colonial Court.* On the hearing of an application to strike the name of a solicitor off the Roll of Solicitors of the Supreme Court, it was proved that an order had been made by the Supreme Court of a Colony to strike the name of the solicitor off the roll of solicitors of that Court for misconduct, but no direct evidence of the facts constituting the alleged misconduct was produced before the Divisional Court:—

*Held*, that, in the absence of legal evidence of the alleged misconduct, the Court could not act on the order of the Colonial Court alone, and the application must be refused. *In re* A SOLICITOR. *Ex parte* INCORPORATED LAW SOCIETY **Div. Ct. 331**

**SPECIAL CASE**—Statement of—Setting aside award—Duty of arbitrator—Misconduct *See* ARBITRATION. **131**

**STAMP**—Appeal—Stamp objection - **501**
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—— Conveyance on sale—Leasehold interest in licensed house—Goodwill - **226**
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—— Duty—Foreign security issued in United Kingdom - - - - **78**
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—— Policy—Reinsurance—"Covering note"—Contract for sea insurance not expressed in policy - - - - **829**
*See* INSURANCE, MARINE. 5.

—— Trust deed for securing debentures—Transfer of mortgage—Substituted security
*See* REVENUE. 8. **408**

**STANNARIES COURT**—Company—Winding-up—Jurisdiction—Committal for contempt
*See* PROHIBITION. **669**

**STATUTES:—**

13 & 14 Car. 2, c. 12, s. 21—*Poor Relief* **594**
*See* POOR LAW.

55 Geo. 3, c. 184, s. 37—*Stamps* - - **205**
*See* REVENUE. 5.

9 Geo. 4, c. 61, s. 4—*Alehouses* - - **802**
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—— —— ss. 4, 14 - - - - **503**
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2 & 3 Will. 4, c. 45, ss. 20, 27—*Reform Act* **67**
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5 & 6 Vict. c. 35—*Income Tax* - - **326**
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—— —— s. 100, Sched. D - - **95**
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6 & 7 Vict. c. 36, s. 1—*Scientific Societies* **809**
*See* LOCAL GOVERNMENT. 7.

8 & 9 Vict. c. 20, ss. 53, 54—*Railways Clauses*
*See* RAILWAY. 1. **473**

11 & 12 Vict. c. 43, s. 1—*Summary Jurisdiction*
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16 & 17 Vict. c. 34—*Income Tax* - **326**
*See* REVENUE. 4.

—— —— s. 2, Sched. D - - - **95**
*See* REVENUE. 3.

16 & 17 Vict. c. 119, ss. 1, 3—*Betting* - **875**
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20 & 21 Vict. c. clvii., s. 11—*Mayor's Court of London* - - - - **513**
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23 & 24 Vict. c. 93, s. 28—*Tithes* - **164**
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23 & 24 Vict. c. 127, s. 28—*Solicitors* - **520**
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24 & 25 Vict. c. 97, s. 51—*Malicious Injuries to Property* - - - - **556**
*See* CRIMINAL LAW. 3.

—— —— s. 52 - - - **316, 868**
*See* CRIMINAL LAW. 4, 7.

24 & 25 Vict. c. 109, s. 8—*Salmon Fishery* **405**
*See* FISHERY.

25 & 26 Vict. c. 89, s. 32—*Companies* - **754**
*See* COMPANY. 1.

26 & 27 Vict. c. 65, s. 21—*Volunteers* - **888**
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30 & 31 Vict. c. 102, ss. 3, 27—*Representation of the People* - - - - **67**
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31 & 32 Vict. c. 54, ss. 3, 4—*Judgments Extension* - - - - - **383**
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32 & 33 Vict. c. 62, s. 5—*Debtors* - **20**
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33 & 34 Vict. c. 75, s. 35—*Elementary Education* - - - - - **4**
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35 & 36 Vict. c. 33, s. 1—*Elections—Ballot* **552**
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35 & 36 Vict. c. 65, s. 3—*Bastardy* - **734**
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35 & 36 Vict. c. 91, s. 2—*Borough Funds* **604**
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35 & 36 Vict. c. 94, s. 50—*Licensing* - **334**
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36 & 37 Vict. c. 66, s. 19—*Judicature* - **859**
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36 & 37 Vict. c. 71, s. 18—*Salmon Fishery* **405**
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37 & 38 Vict. c. 49, ss. 3, 9—*Licensing* - **114**
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38 & 39 Vict. c. 55, ss. 210, 229, 230 - 336
*See* LOCAL GOVERNMENT. 8.

38 & 39 Vict. c. 60, s. 15, sub-s. 3—*Friendly Societies* - - - - 469
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38 & 39 Vict. c. 86, ss. 7, 16—*Conspiracy and Protection of Property* - - 61
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39 & 40 Vict. c. 61, ss. 1, 3, 8—*Divided Parishes* - - - - 594
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41 & 42 Vict. c. 16, ss. 17, 83, 94—*Factories and Workshops* - - - - 881
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—— —— s. 93, Sched. IV., Part I., s. 2 344
*See* FACTORY ACTS. 2.

41 & 42 Vict. c. 31, s. 10, sub-s. 2—*Bills of Sale* - - - - 657
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41 & 42 Vict. c. 74, s. 34—*Contagious Diseases (Animals)* - - - - 23
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42 & 43 Vict. c. 49, s. 17, sub-s. 2—*Summary Jurisdiction* - - - - 582
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44 & 45 Vict. c. 12, s. 38, sub-s. 2 (*a*), (*c*)—*Customs and Inland Revenue* - 318
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44 & 45 Vict. c. 41, s. 14, sub-s. 1—*Conveyancing and Law of Property* - - 276
*See* LANDLORD AND TENANT. 3.

44 & 45 Vict. c. 58, ss. 41, 43, 45, 158, 176—*Army* - - - - 888
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45 & 46 Vict. c. 43, s. 7—*Bills of Sale* - 543
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45 & 46 Vict. c. 50, s. 58—*Municipal Corporations* - - - - - 552
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—— —— s. 140, sub-ss. 1—3, ss. 141—143, Sched. V., Part II., clause 5 (*d*) - 604
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46 & 47 Vict. c. 34, s. 6—*Cheap Trains* - 643
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46 & 47 Vict. c. 52—*Bankruptcy* - 787
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46 & 47 Vict. c. 52, s. 73, sub-s. 3 - 287
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*See* BANKRUPTCY. 11.

46 & 47 Vict. c. 61, s. 7—*Agricultural Holdings*
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47 & 48 Vict. c. 70, s. 36—*Municipal Elections—Corrupt Practices* - - 353
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48 & 49 Vict. c. 3, ss. 2, 5, 7—*Representation of the People* - - - 67
*See* PARLIAMENT. 1.

48 & 49 Vict. c. 69, ss. 5, 9—*Criminal Law Amendment* - - - - 174
*See* CRIMINAL LAW. 6.

51 & 52 Vict. c. 25—*Railway and Canal Traffic*
*See* RAILWAY. 3. 748

51 & 52 Vict. c. 41, s. 11—*Local Government*
*See* LOCAL GOVERNMENT. 9. - 847

—— —— s. 38 - - - - 141
*See* LOCAL GOVERNMENT. 1.

51 & 52 Vict. c. 43, ss. 65, 94—*County Courts*
*See* COUNTY COURT. 4. 660

—— —— ss. 65, 116 - - - 564
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—— —— s. 116 - - - - 56
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52 & 53 Vict. c. 7, s. 11—*Customs and Inland Revenue* - - - - 318
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52 & 53 Vict. c. 21, s. 22—*Weights and Measures* - - - - 170
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53 & 54 Vict. c. 71, s. 1—*Bankruptcy* - 419
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54 & 55 Vict. c. 76, s. 4, sub-ss. 1, 4; s. 11, sub-s. 1—*Public Health (London)* 775
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55 & 56 Vict. c. 57, ss. 5, 6—*Private Street Works* - - - - 294
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56 & 57 Vict. c. 73, ss. 1 sub-s. 3, 67, 68, 75—*Local Government* - - - 594
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57 & 58 Vict. c. 30, s. 2, sub-s. 1 (*c*)—*Finance Act* - - - - - 318
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57 & 58 Vict. c. 41—*Prevention of Cruelty to Children* - - - - 179
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57 & 58 Vict. c. ccxiii., s. 9, sub-s. 4—*London—Building* - - - - 863
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58 & 59 Vict. c. cxxx.—*Tower Bridge Southern Approach* - - - - 387
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59 & 60 Vict. c. 16, ss. 1, 5, 6, 9—*Agricultural Rates* - - - - 683
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59 & 60 Vict. c. 45, s. 1—*Stannaries Court—Abolition* - - - - 669
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**TICKET**—Coal—"Correct weight" - 170
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**TIME**—Of commencing prosecution—Offences against the person - - - 174
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**TITHE**—Apportionment—Order for removal of parish documents—Justices—Jurisdiction - - - - - 164
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**TOLLS**—*Prescriptive Right—Extinguishment of old Franchise by Statute—Merger—Lost Grant.*

A municipal corporation had in the year 1734 a prescriptive right to take certain customary tolls for the passage of carriages, cattle, &c., over a bridge belonging to them. From one only of these tolls, namely, a toll in respect of hackney carriages, freemen of the borough were exempt. In 1734 the corporation obtained a local Act, which, after reciting the existence of their right to take the customary tolls and enumerating those tolls, provided that the said customary tolls should be and remain vested in them. The Act further provided that it should be lawful for the collectors appointed by the corporation to demand

**TOLLS**—*continued.*

the respective tolls before mentioned from all persons other than freemen of the borough. In the year 1819 the corporation obtained another local Act, by which the former Act was repealed, and they were empowered to take down the old and build a new bridge, and to take tolls for passage over it which exceeded in amount the old tolls and included additional subject-matters. There was no exemption in this Act in favour of freemen. This last-mentioned Act was a temporary Act, and its provisions had been allowed to expire:—

*Held*, that the prescriptive right of the corporation to take tolls had been extinguished, and a statutory right substituted for it, by the local Act of 1734, or, if not by that Act, then by the local Act of 1819.

By Rigby L.J. and Collins L.J.: The Act of 1734 having given a statutory title to the tolls which had been previously taken by virtue of a prescriptive right, the title by prescription was merged in and extinguished by the statutory right. TAYLOR *v.* NEW WINDSOR CORPORATION
**C. A. 186**

**TORT**—Action founded on—Costs—Contract of agistment—Negligence - - **56**
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**TOWER BRIDGE SOUTHERN APPROACH ACT, 1895**—Valuation - - - **387**
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**TRADE**—Custom of—Reputed ownership—Assignment of debt—Bill of exchange **787**
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**TRANSFER**—Licence—Premises pulled down—Person to apply - - - **503**
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**TRESPASS**—Grass field—Actual damage—Malicious injury to property - - **316**
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**TRIAL**—Right to trial by jury—Summary jurisdiction - - - - **582**
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**TRUSTEE**—Breach of trust—Advancement **648**
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**TRUSTEE IN BANKRUPTCY**—Joinder—Security for costs—Jurisdiction - - **660**
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**UNDERGROUND BAKEHOUSE**—Premises vacant at commencement of Act - - **640**
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**UNDERLESSEE**—Lease of public-house—Licence—Breach of covenant - - **716**
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**UNDERWRITER**—Liability for consequential damage—Cost of disposing of cargo rendered worthless by sea peril - **821**
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**VALUATION**—"Betterment"—Trade interest—Tied public-house - - - **387**
*See* LONDON. 6.

**VOLUNTEER**—"*Subject to Military Law*"—"*When being Trained or Exercised with Regular Forces*"—*Returning from Training—Assault and False Imprisonment—Obedience to Order of Superior Officer—Army Act*, 1881 (44 & 45 *Vict. c.* 58), *ss.* 41, 43, 45, 158, 176—*Volunteer Act*, 1863 (26 & 27 *Vict. c.* 65), *s.* 21.

The plaintiff was a member of a volunteer corps, which was trained and exercised with a portion of the regular forces at Shorncliffe Camp under an order of the War Office, forming a volunteer brigade for the purpose of such training and exercise during the period, August 1 to August 8, 1896. Upon the latter day, while preparations were going on for the departure of the volunteers from the camp, he was charged with larceny from a comrade. The adjutant of the corps gave orders that he should be taken under arrest with the baggage guard to Shorncliffe Station, and thence to Boxmoor Station in the special military train which was on that day to convey the corps home, and that on arrival at the latter station he should be taken to Hemel Hempstead, where he lived, and handed over to the police authority there. The plaintiff was accordingly taken under arrest to Shorncliffe Station, and three of his comrades were there told off to form his escort in the train and to take him from Boxmoor Station to Hemel Hempstead, and there hand him over to the police, which they did.

In an action against them for assault and false imprisonment:—

*Held* (reversing the judgment of Kennedy J., [1898] 1 Q. B. 396), that, by virtue of s. 176 of the Army Act, 1881, the members of the corps were subject to military law from the time when they fell in on August 1 for the purpose of proceeding to the camp to be trained and exercised with the regulars until on their return home on August 8 they were dismissed; and that the plaintiff and defendants were therefore subject to military law at the time when the defendants did the acts complained of, which were consequently justified under ss. 41 and 45 of the Army Act, 1881:

*Held*, also, that the acts of the defendants were justified by virtue of the provisions of s. 158 of the Army Act, 1881.

The words "where an offence under this Act has been committed" in that section mean "where an offence under this Act is alleged to have been committed." MARKS *v.* FROGLEY
**C. A. 888**

**VOTES**—County vote—Qualification—"Dwelling-house joint" - - - **67**
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**WALL**—Boundary—Notice to set back—Forecourt or space - - - **106**
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**WARRANTY**—Implied—Bullion-room—Fitness to resist thieves - - - **567**
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**WATER-CLOSET**—Resolution requiring adoption of particular system—Invalidity - 463
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**WEIGHTS AND MEASURES**—*Coal—Ticket—"Correct Weight"—Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 22.

When coal is conveyed for delivery on sale in bulk, in a vehicle not belonging to the purchaser, the "correct weight," which is required by s. 22 of the Weights and Measures Act, 1889, to be inserted in the ticket which is to be given to the purchaser, is the weight as ascertained at the place from which the coal is brought, and not the weight at the time of delivery. KNOWLES & SONS, LIMITED *v.* SINCLAIR - Div. Ct. 170

—— Inspector—Passenger—Police officer—Conveyance at reduced rate - - 643
*See* RAILWAY. 2.

**WILL**—*Advancement Clause—Power to apply Part of Presumptive Share towards Advancement in Life of Child—Construction of Will—Breach of Trust.*

A testator bequeathed his estate to trustees on trust to pay the income to his children in equal shares, and gave power to the trustees to apply "in or towards the advancement in life of each child a sum not exceeding 500*l.* of his or her presumptive share." The trustees were to be the sole judges of the advisability of such payment and of the signification of the term "advancement in life." After the share of a married daughter had become vested, the trustees at her request advanced 250*l.* to her under this power with knowledge that the sum so advanced would be used to pay a debt due from her husband to one of the trustees:—

*Held*, that this was not a bonâ fide exercise of the power, and was therefore a breach of trust.

*Semble*, that there was no power to make any advance after the share had become vested. MOLYNEUX *v.* FLETCHER - Kennedy J. 648

—— Insolvent testator—Debt due to executor—Retainer in specie - - - 282
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—— Nomination by member—Revocation by subsequent will - - - 469
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—— "Assigns" - - - - - 716
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—— "Correct weight" - - - 170
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—— "Covering note" - - - 829
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—— "Debt provable in bankruptcy" - 622
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—— "Defects latent on beginning voyage or otherwise" - - - - 645
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—— "Direct communication" - - 863
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—— "Dwelling-house joint" - - 67
*See* PARLIAMENT. 1.

—— "Factory" - - - - 344
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—— "Open cover" - - - - 829
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—— "Sailing" - - - - 27
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—— "Street" - - - - 294
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